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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LIUDAS KAIRYS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dated: April 25, 1986

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QUESTIONS PRESENTED

1. Should the 1961 "illegal procurement" amendment to the denaturalization statute be construed to apply retroactively to divest citizenship acquired earlier?

2. Does the Constitution permit the Government to strip naturalized Americans of their citizenship by use of a retroactive change of law?

3. Does the Constitution permit denaturalization without proof of an intentional act tainting the acquisition of citizenship?

4. Does the Constitution guarantee a trial by jury in denaturalization cases?

5. Is the requirement of Rule 901(b)(8) of the Federal Rules of Evidence that an "ancient document" be "in such condition as to create no suspicion concerning its authenticity" satisfied by saying that evidence indicating tampering and forgery is outweighed by evidence indicating authenticity?

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VS.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Liudas Kairys, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 27, 1986.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 782 F.2d 1374. (App. A). Its judgment is reproduced as Appendix B. The opinion of the district court is reported at 600 F.Supp. 1254. (App. C).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 27, 1986. (App. B1). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The relevant portions of the Constitution (art. I, § 8, cl. 4; art. I, § 9, cl. 3; art. III, § 2, cl. 3; amend. V; amend. VI; amend. VII; amend. XIV, § 1), statutes (8 U.S.C. §§ 1451(a) & (i); Pub. L. 87-301, § 18(a), 75 Stat. 656), and rules (Fed.R.Evid. 901(a) & (b)(8)) are reproduced in Appendix E.[1]

STATEMENT OF THE CASE

Petitioner, Liudas Kairys, is a Baltic emigre who came to the United States in 1949 and achieved American citizenship in 1957. In 1980 the Government filed this action to revoke his citizenship under § 340(a) of the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. § 1451(a). The Government alleged that in 1943 and 1944 petitioner had served as a guard at the Nazi forced labor camp at Treblinka, Poland and that he had intentionally misrepresented and concealed that fact in obtaining his visa and citizenship.

The district court found that petitioner had been a camp guard. The trial court also found, however, that petitioner had not willfully misrepresented or concealed that service when applying for his visa or citizenship.[2] Accordingly, the district court held that, under the "fraudulent procurement" provision that was the sole ground for denaturalization in 1957 (and that remains a ground today), the Government had failed to prove "concealment of a material fact or ... willful misrepresentation." (App. C22-25).

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[1] The transcript of the district court's reasons for striking petitioner's jury demand is Appendix D, and certain additional legislative-history materials are reproduced in Appendix F. All emphasis is added.

[2] The district court also rejected the Government's claim that petitioner had personally participated in atrocities. (App. C1-2, C15).

The district court nevertheless denaturalized petitoner, holding that he should lose his 1957 citizenship under a 1961 amendment adding a new ground for denaturalization. According to the court, the 1961 "illegal procurement" amendment to § 340(a), 75 Stat. 656, authorizes denaturalization if the citizen did not meet one of the statutory prerequisites to naturalization,[3] without regard to whether he misrepresented any material fact or even knew of his failure to meet a prerequisite. (App. C31-32).

The trial judge held that no retroactivity problem was posed by the application of the 1961 amendment to petitioner's 1957 citizenship because the amendment was "remedial." (App. C26). The court of appeals rejected the "remedial" label, noting that "[t]he 'illegal procurement' amendment operates to divest an individual of the prized status of citizenship when prior to its 1961 passage that right was vested . . . ." (App. A11).

Although the appeals court acknowledged that "[l]egislative enactments are presumed to be prospective absent clear statements by Congress to the contrary" (App. A10), it construed the amendment to apply retroactively despite the absence of any language in the 1961 amendment or its legislative history addressing the retroactivity question one way or the other. Instead, the court inferred that Congress intended retroactivity from the existence of a "separate provision for retroactivity" (INA § 340(i), 8 U.S.C. § 1451(i)) contained in the underlying 1952 denaturalization statute. (App. A12-13). Again, the court did not cite any legislative history to demonstrate that the 1961 Congress understood and intended the 1952 provision to operate by reference to make the 1961 amendment apply to previously-granted citizenship. Instead, the court simply stated that the 1961 Congress "was presumably aware" of the 1952 retroactivity section. (App. A13).

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[3] The trial court held that camp guard service rendered an individual ineligible for a visa and thus for citizenship. (App. C20, C31-32).

Because the appeals court construed the 1961 amendment to apply retroactively, it was required to resolve petitioner's constitutional challenges. Petitioner argued that both the Citizenship Clause of the Fourteenth Amendment and the equal protection guarantees of the Fifth Amendment require that denaturalization be based on an intentional act tainting the acquisition of citizenship, just as expatriation of native-born citizens requires an intentional renunciation. The appeals court rejected the equal protection argument by reason of the "inherent differences" between naturalized and native-born citizens (App. A16), but did not address the Citizenship Clause argument.

Nor did the court address petitioner's related arguments that the *retroactive* change in denaturalization standards violated the substantive protections of the Citizenship and Due Process Clauses. The court did hold that, because denaturalization proceedings are labeled "civil" rather than "criminal," the retroactive change was not a forbidden *ex post facto* law.

The court's retroactivity and constitutional rulings all occurred against the backdrop of its affirmance of the district court's admission of the key exhibit on the threshold issue of whether petitioner had served as a guard. Expert testimony from petitioner's and the Government's document examiners revealed several indications of tampering or forgery, and the district court conceded that "certain aspects of the document were open to certain questions." (App. C10). The trial court nevertheless admitted the document, apparently because it concluded that this evidence was outweighed by other indicia of genuineness. Petitioner objected both at trial and on appeal

that such a balancing approach is precluded by the express terms of Federal Rule of Evidence 901(b)(8), which forbids the admission of such an "ancient document" unless it is "in such condition as to create *no suspicion* concerning its authenticity." The appeals court, citing the trial court's broad discretion in evidentiary matters, affirmed the admissibility ruling and stated that the evidence of forgery and tampering went to weight. (App. A8).

Petitioner had demanded a jury trial so that any such questions of weight and credibility would be resolved by a panel of his fellow citizens. The trial court struck the demand, and the appeals court affirmed, adhering to this Court's 1913 decision, *Luria v. United States*, 231 U.S. 9, 27-28 (1913), that there is no right to a jury in denaturalization cases. (App. A18).

REASONS FOR GRANTING THE WRIT

Under the 1961 "illegal procurement" amendment, the American citizenship of every immigrant[4] is forfeit if the Government finds evidence that, without regard to whether the citizen ever misled anyone about his background, he had failed to satisfy one of the visa requirements in effect when he entered this country. The statute represents a legislative dilution of citizenship which, once granted, is inviolate under the Constitution absent an intentional renunciation or proof of an intentional misrepresentation when obtained. The amendment also impermissibly distinguishes between classes of citizens, relegating naturalized Americans to second-class status by eliminating the intent requirement only as to them.

Remarkably, the court of appeals held that the 1961 amendment applies to citizens who had already obtained their prized status before its enactment. Even assuming the constitutionality of the provision as applied to later-granted

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[4] More than seven million Americans achieved their citizenship through naturalization before 1961, and another three million did so in the following twenty years. Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States: 1985* at 92 (105th ed. 1984).

citizenship, this retroactive application to existing citizens raises profound questions concerning the constitutionality of *post-hoc* changes to denaturalization standards.

The court of appeals reached these issues only because it departed from several of this Court's settled canons of statutory construction. The "first rule" of statutory construction is that an enactment should never be applied retroactively unless by clear and unequivocal language the legislature has manifested an unmistakable intent to do so. Similarly, absent a clear legislative directive, statutes should be construed to avoid serious constitutional questions and to avoid impinging on substantial interests. And, when citizenship hangs in the balance, this Court requires all legal doubts to be resolved in favor of the citizen and prohibits destruction of citizenship rights based on an ambiguity.

Given the absolute silence of Congress on the retroactivity issue, these principles, individually and as they reinforce each other, require that the 1961 "illegal procurement" amendment be applied prospectively only.

The proper interpretation and the constitutionality of the 1961 amendment are "important question[s] of federal law which ha[ve] not been, but should be, settled by this Court." (Sup.Ct.R. 17.1(c)). As this Court has several times observed, certiorari is merited when the questions posed are important to the administration of the naturalization laws. *See, e.g., United States v. Menasche*, 348 U.S. 528, 531 (1955); *Baumgartner v. United States*, 322 U.S. 665, 666 (1944); *United States v. Ness*, 245 U.S. 319, 321 (1917). Moreover, the manner in which the court of appeals resolved these questions—in contravention of basic rules of statutory construction—"so far departed from the accepted and usual course of judicial proceedings" as to "call for an exercise of this Court's power of supervision." (Sup.Ct.R. 17.1(a)).

So too, the relief sought by the Government makes these issues, as well as the jury-trial and evidentiary issues, particularly appropriate for review. The status of citizenship goes to

the very heart of the relationship between the government and the governed. When the sovereign seeks to destroy that relationship, this Court has granted certiorari in the absence of circuit conflicts[5] and has reviewed questions of narrow—and perhaps singular—application. *E.g., Klapprott v. United States*, 335 U.S. 601 (1949) (denaturalization by default judgment); *Nowak v. United States*, 356 U.S. 660 (1958) (whether the particular facts proved fraudulent procurement). Here, by contrast, the questions are of general importance to the rights of all naturalized Americans.[6]

We stress, however, that review and reversal would not handcuff the Justice Department in its efforts to rid the United States of Nazis who obtained citizenship under false pretenses. To our knowledge, in every other "Nazi war criminal" denaturalization case in which the Government prevailed on the threshold identification issue, it also proved a willful misrepresentation or concealment of wartime service. In contrast, a substantial danger posed by the court of appeals' ruling in this case is that, as the political climate and enforcement priorities change over the years, other immigrants could be targeted for expulsion for whatever reason, and their precious rights of citizenship lost if the Government establishes that, though no material misrepresentation took place, decades ago they failed to satisfy one of the many requirements for legal entry into this country.

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[5] *E.g., Costello v. United States*, 365 U.S. 265, 267 (1961); *Chaunt v. United States*, 364 U.S. 350, 351 (1960); *Gonzales v. Landon*, 350 U.S. 920 (1955) (*per curiam*); *Schneiderman v. United States*, 320 U.S. 118, 119 (1943).

[6] The posture of the questions also makes this case suitable for review. None of the questions is hypothetical, and each comes to this Court squarely framed and unencumbered with subsidiary or factual disputes. All but one of the questions are pure matters of law. As to the other, the admissibility of a document necessarily entails some consideration of the record, but the factual background on that question is narrow and well presented.

I. SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION PRECLUDE RETROACTIVE APPLICATION OF THE 1961 CHANGE OF LAW.

A. Several independent but reinforcing principles establish that the 1961 amendment should not be applied retroactively absent explicit, unequivocal direction from Congress.

In *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982), this Court reiterated that:

> "(T)he first rule of [statutory] construction is that legislation must be considered as addressed to the future, not to the past .... The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights ... unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" *Union Pac. R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913).

See also Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944). This principle applies equally to amendments. *United States Fidelity & Guaranty Co. v. United States*, 209 U.S. 306, 314-15 (1908).

The Court has also taught that statutes should be construed, whenever possible, to avoid serious constitutional questions. *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). *See also Jean v. Nelson*, —U.S.—, 105 S.Ct. 2992, 2997-99 (1985); *United States v. Security Industrial Bank*, 459 U.S. at 78.

Similarly, where important interests are at stake, this Court has avoided constructions that impinge on those interests, even though such constructions might pass constitutional muster, absent "the affirmative intention of Congress clearly expressed." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490,

501 (1979) (First Amendment values). *See also McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10, 21-22 (1963) (foreign affairs); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (same); *Pennhurst State School v. Halderman*, 451 U.S. 1, 16-17 (1981) (federal-state relations). Here, the rights of citizenship stand on the highest rung of protected interests.

Finally, reinforcing each of these rules of statutory construction is the paramount principle that in denaturalization cases both "the facts *and the law* should be construed as far as is reasonably possible in favor of the citizen." *Schneiderman v. United States*, 320 U.S. 118, 122 (1943). This precept requires that "[r]ights of citizenship are not to be destroyed by an ambiguity." *Perkins v. Elg*, 307 U.S. 325, 337 (1939) (treaty ambiguity); *Nishikawa v. Dulles*, 356 U.S. 129, 136 (1958) (evidentiary ambiguity). *Cf. Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (ambiguous statutes construed in aliens' favor).

B. Congress was silent on the retroactivity question. The court of appeals' retroactive construction was reached only through a forced statutory analysis.

Given the foregoing canons of statutory construction, retroactive application of the "illegal procurement" amendment is impermissible unless Congress so directed in clear and explicit language. The plain fact, however, is that *nothing* in the terms of the 1961 amendment or its legislative history suggests that Congress even considered, much less intended, retroactive application. *See* 75 Stat. 656 (1961); H.R. Rep. No. 1086, 87th Cong., 1st Sess. 38-40 (1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 2950, 2982-84; 107 Cong. Rec. 18,280-86 (1961) (House); 107 Cong. Rec. 19,650-57 (1961) (Senate). This legislative silence should have ended the matter.

It did not. Instead, the court of appeals inferred a "sufficient expression of congressional intent" (App. All) through a Byzantine analysis of *other* sections of the 1952 and 1961 statutes.

The court of appeals placed principal reliance on the existence of § 340(i), 8 U.S.C. § 1451(i), a provision enacted in 1952 and left untouched in 1961. Section 340(i) provides:

> The provisions of this section [340] shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court . . . .

The court of appeals said that Congress "was presumably aware" of this 1952 provision when it enacted the 1961 amendment, and then inferred that the 1961 Congress intended that its "illegal procurement" amendment be rendered retroactive by the 1952 provision. (App. A13). Such an inference based on a presumption not only violates accepted canons of construction, it also makes no sense in light of the history of § 340(i).

Section 340(i) *freed* naturalized Americans from denaturalization for "illegal procurement," which had been a grounds for denaturalization before Congress enacted the Immigration and Nationality Act of 1952. *Compare* § 338(a) of the Nationality Act of 1940, 54 Stat. 1158-59 (1940), *with* INA § 340(a), 66 Stat. 260 (1952). And, although the court of appeals believed that "[t]he 'illegally procured' language [was] *inexplicably* and apparently *inadvertently* dropped from the 1952 Act" (App. A13 n.12), the legislative history of the 1952 Act reveals a deliberate change:

> One of the *major changes* in existing nationality law provided by the bill is contained in section 340 which authorizes judicial revocation of naturalization. . . . *The bill changes the basis for judicial revocation of naturalization*

> *from fraud and illegal procurement to procurement by concealment of a material fact or by willful misrepresentation.*

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 82-83 (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1741.[7]

By means of the retroactivity provision in § 340(i), the 1952 Congress also eliminated illegal procurement as a ground to attack "naturalizations heretofore granted." *See United States v. Stromberg*, 227 F.2d 903 (5th Cir. 1955). The court of appeals, however, conceived of § 340(i) as a "separate provision for retroactivity" (App. A13) requiring retroactive application of any *subsequent* amendment to § 340(a). In its view, "when Congress amended [§ 340(a)] it was *already* a retroactive subsection by virtue of subsection (i) . . . ." (App. A12). Under this reasoning, the 1961 Congress silently intended the 1952 provision to reapply "illegal procurement" to the very citizens the 1952 provision had exempted.

Moreover, the court of appeals was driven to concede that, even considered as "a separate provision for retroactivity," the terms of § 340(i) did not cover petitioner's 1957 citizenship. Section 340(i) makes the provisions of § 340(a) applicable to "naturalizations *heretofore* granted"—*i.e.*, before 1952, when § 340(i) was enacted. Therefore, under the Seventh Circuit's approach, the actual terms of the 1952 provision could make the 1961 change of law applicable only to *pre-1952* citizenship, and not to petitioner's of 1957. To fill the apparent gap, the appellate court simply asserted that it would be "illogical" to exclude petitioner's citizenship:

> It would be completely illogical to conclude that Congress intended the illegal procurement denaturalization standard

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[7] *See also* S. Rep. No. 1137, 82d Cong., 2d Sess. 45 (1952); Immigration and Naturalization Service, Department of Justice, *Report on S. 3455 [81st Cong., 2d Sess.], A Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality; And for Other Purposes* at 339-1 ("It is observed from the new language contained in the bill that *there has been removed*, as a basis for cancellation of citizenship, *the ground of illegality* . . . .") (App. F1).

> to apply to pre-1952 Act and post-1961 Act naturalizations and not to others such as this 1957 grant. That conclusion would serve to make the denaturalization requirements ineffective for naturalized citizens such as the defendant. . . . [C]ongress surely did not mean to create a loophole class of people who would not be subject to the new (1961) version of the statute.

(App. A13). We agree. But the "illogical" result of its statutory analysis should have led the court of appeals to reconsider its initial premise and conclude instead that the 1961 Congress did not intend to make "illegal procurement" retroactive at all.

Given the importance of citizenship rights and the Rube Goldberg-like statutory scheme the court of appeals erected to destroy them—where a 1952 provision is employed to make a 1961 provision retroactive and then an illogical nine-year loophole is eliminated by judicial reasoning—one would expect some legislative history at least hinting that Congress foresaw such an approach. As noted, none exists.[8] Moreover, the Justice Department, which expressed doubts about the wisdom and constitutionality of a proposed retroactive change in denaturalization *evidentiary* rules, gave no indication that it understood the 1961 amendment to retroactively change the *substantive* grounds for denaturalization. (App. F3-12).[9]

Although the court of appeals could cite no pertinent legislative history on the "illegal procurement" provision itself,

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[8] *See* p. 9, *supra*. To our knowledge, no other court has ever found that Congress rendered an amendment retroactive by silent reference to an earlier retroactivity provision.

[9] Similarly, there is nothing in the legislative history of § 340(i) to suggest that the 1952 Congress or the Justice Department anticipated that, should a later Congress amend § 340(a), the later amendment would automatically apply retroactively. *See* H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653; S. Rep. No. 1137, 82d Cong., 2d Sess. (1952); App. F2.

it did observe that Congress had expressly made two of the other twenty-four sections of the 1961 Act "prospective." It then reasoned that "when Congress wished to make provisions prospective in the 1961 Act . . . it expressly did so, still another indication that the provision at issue was meant to be retroactive." (App. A13-14).

The appellate court's reasoning by negative inference does not satisfy this Court's requirement of a "manifest" intent on the part of Congress before an enactment be given retroactive effect. As Justice Rutledge observed, concurring in *Cleveland v. United States*, 329 U.S. 14, 22 n.5 (1946), deriving congressional intent by negative inference is a "process lending itself to much guesswork." Such guesswork is particularly inappropriate here, because the two provisions that were expressly declared prospective were procedural in nature and therefore would have applied retroactively to pending actions absent a contrary legislative directive.[10] What these sections really show is that, when Congress wants to reverse a presumption that an amendment will or will not apply retroactively, it knows how to do so in plain language.

The court of appeals' final basis for retroactive application was that it found its interpretation "consistent" with the "purpose of the illegal procurement provision," which it considered to be "to effectuate the purposes of both the naturalization and denaturalization statutes." (App. A13). The lower court's reading of the general congressional purpose, however, does not answer the specific question of whether Congress wanted its change of law to divest citizenships previously acquired. If

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[10] Section 17 was a "clarifying amendment" intended to reiterate congressional intent that naturalization petitions be considered only under the 1952 Act. Section 19 enacted new evidentiary rules for expatriation actions. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 38, 40-41 (1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News at 2981-82, 2984-85. Clarifying amendments and evidentiary rule changes normally apply "retroactively" to pending cases absent a contrary legislative directive. 1A N. Singer, *Sutherland Statutory Construction* §22.36 at 301 (Sands 4th ed. 1985); *Thompson v. Missouri*, 171 U.S. 380 (1898); *Hopt v. Utah*, 110 U.S. 574 (1884).

reference to the general "purpose" of a congressional condemnation of a perceived evil were sufficient to authorize a retroactive attack on the evil, then nothing would remain of this Court's "first rule of construction" requiring a "manifest" expression of retroactive intent.

Referencing a general statutory purpose to justify a retroactive construction also ignores countervailing policies of which Congress is generally aware—chief among them fairness. Such policies are, of course, forcefully implicated when citizenship rights are at stake. As the 1952 Congress noted:

> Legislation such as this, legislation which will affect the fate of millions of human beings in this country and abroad, has to be approached with foresight and caution. It requires painstaking study, as well as careful weighing of equities, human rights, and continuous consideration of the social, economic, and security interests of the people of the United States.

H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27 (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News at 1678.

Such a painstaking study and a careful weighing of equities surely would have been undertaken by the 1961 Congress if it had actually intended to change the status of Americans already naturalized. Because Congress never even mentioned the subject, the Seventh Circuit should have honored the "very strong presumption." *United States Fidelity & Guaranty Co. v. United States*, 209 U.S. at 314, that Congress intended the 1961 law to apply only prospectively. The court of appeals' failure to do so works a grave disservice to the millions of naturalized Americans whose pre-1961 citizenship can now be taken away on previously nonexistent grounds.

II. THE ELIMINATION OF THE INTENT REQUIREMENT FOR DENATURALIZATION, PARTICULARLY AS APPLIED RETROACTIVELY, IS UNCONSTITUTIONAL.

A proper construction of the "illegal procurement" amendment would have obviated the need to resolve the constitutional

issues discussed below. But since these issues have been raised by the court of appeals' decision, the interests of all naturalized American citizens require that they be resolved correctly by this Court.

A. The Constitution requires that denaturalization be premised on an intentional act tainting the procurement of citizenship.

The status of naturalized and native-born Americans is secured by the Citizenship Clause of the Fourteenth Amendment: "All persons born or naturalized in the United States . . . are citizens of the United States. . . ." In *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967), which required proof of an intentional renunciation of citizenship in expatriation cases, this Court declared that the Citizenship Clause "provides its own constitutional rule in language calculated completely to control the status of citizenship." Thus:

> There is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time. Rather the Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit.

These protections, by the terms of Section 1 of the Fourteenth Amendment and through equal protection principles, apply equally to naturalized citizens. As this Court explained in *Schneider v. Rusk*, 377 U.S. 163, 165-66 (1964), when declaring unconstitutional a statute denaturalizing citizens who returned to live in their former homelands for three years:

> *We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive.* The only difference

> drawn by the Constitution is that only the "natural born" citizen is eligible to be President. Art. II, § 1.
>
> While the rights of citizenship of the native born derive from § 1 of the Fourteenth Amendment and the rights of the naturalized citizen derive from satisfying, *free of fraud*, the requirements set by Congress, the latter, apart from the exception noted, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respect the individual." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 827 (1824).

Notwithstanding these principles, the court of appeals upheld the abolition of the intent requirement in denaturalization cases, stating that the constitutional objections are foreclosed by this Court's decision in *Fedorenko v. United States*, 449 U.S. 490 (1981). (App. A15-17).

The appeals court was wrong. *Fedorenko* nowhere says that naturalized citizenship can be abrogated based on an unintentional or unknowing failure to have met a visa requirement years earlier. To the contrary, *Fedorenko*'s references to the "illegal procurement" ground for denaturalization were made in the context, repeatedly stressed by the Court, that Fedorenko had procured his visa by *intentionally misrepresenting* his wartime service. (*E.g.*, 449 U.S. at 496, 500, 507). *Fedorenko* is best understood as an explanation of why, given *Afroyim* and *Schneider*, the Government is *ever* permitted to take away previously-granted citizenship absent a voluntary renunciation.[11] It should not be read as sanctioning denaturalization in the absence of the kind of intentional misrepresentation present in that case.

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[11] This basic issue had been the subject of intense debate. *See Schneider*, 377 U.S. at 166; Hurst, *Can Congress Take Away Citizenship?* 29 Rocky Mtn.L.Rev. 62 (1956).

Nor was the court of appeals' analysis buttressed by its references to *United States v. Ginsberg*, 243 U.S. 472 (1917), and *United States v. Ness*, 245 U.S. 319 (1917), early "illegal procurement" cases. As an initial matter, the court of appeals may have erred when stating that "both involved unintentional acts before citizenship." (App. A16 n.15). In *Ginsberg*, it is not clear whether the defendant knew of the requirement that the final naturalization hearing be held in "open court" rather than in chambers. (243 U.S. at 474-75). In *Ness*, by contrast, the defendant actually knew that the statute required a certificate of arrival and that he did not have one. (245 U.S. at 320-21).

More fundamentally, however, *Ginsberg* and *Ness*, both decided in 1917, are relics of an era when naturalized citizenship was considered merely "an instrument granting political privileges" and was likened to an administrative grant of land or of letters patent. *Johannessen v. United States*, 225 U.S. 227, 238 (1912). *See also Luria v. United States*, 231 U.S. at 24. This way of thinking has long since passed. Today, naturalized citizenship is recognized as a "precious right," *Schneiderman*, 320 U.S. at 125, and a "priceless treasure," *Fedorenko*, 449 U.S. at 507, which creates rights that "are of the same dignity [as] and are coextensive" with those of the native born. *Schneider*, 377 U.S. at 165. For these reasons, this Court has all but rejected the 1910's approach to naturalized citizenship. *Schneiderman*, 320 U.S. at 124 n.3.

We urge this Court to accept this case to clarify whether, in the 1980's, a naturalized citizen can be stripped of his status in society absent proof of a willful misrepresentation or a knowing failure to meet one of the visa or citizenship requirements. Under the court of appeals' decision, every one of the millions of naturalized citizens is at risk that, though he never lied to anyone and may not even have known of his disqualifying characteristic, he may lose his citizenship if he is singled out for investigation and the Government can prove some unintentional irregularity in his original entry into the United States.

As the trial judge explained when describing why he was "troubled" by the elimination of the intent requirement (App. C29):

> The absence of defined constitutional restrictions . . . leaves citizenship by naturalization vulnerable to revocation many years later, regardless of culpability. For example, a physical examination years later may determine that an immigrant had, unknown to him, tuberculosis when he entered this country and was therefore ineligible for a visa. Continued citizenship may, in those circumstances, depend solely upon an executive decision not to seek revocation.

Since use of the denaturalization statutes for political or other illicit purposes is not without precedent[12] and since no naturalized citizen can be certain that he was not originally ineligible to enter the country on some unknown ground, the consequence of the court of appeals' decision may be that some naturalized citizens, innocent of any wrongdoing yet not wanting to call attention to themselves, will opt not to exercise their political rights as citizens. Such a result, we submit, is intolerable, and certainly should not obtain without careful consideration by this Court. As this Court observed in *Schneiderman*, 320 U.S. at 159, rendering "the security of the status of our naturalized citizens [dependent] in considerable degree upon the political temper of majority thought and the stresses of the times" would be a consequence "foreign to the best traditions of this nation and the characteristics of our institutions."

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[12] *E.g.*, *United States v. Holtz*, 54 F.Supp. 63, 79-80, 83-84 (N.D.Cal. 1944) (effort to denaturalize citizens only tenuously connected to German-American Bund); *Chaunt v. United States*, 364 U.S. 350 (1960) (effort to denaturalize alleged Communist); *Nowak v. United States*, 356 U.S. 660 (1958) (same); *Bridges v. Wixon*, 326 U.S. 135 (1945) (effort to deport trade-union organizer). *See also* M. Seller, *Historical Perspectives on American Immigration Policy*, 45 Law & Contemp. Probs. 137, 151 (Spring 1982), discussing the post-World War I Palmer raids when thousands of Jews, Italians and Slavs were deported as revolutionaries, "often on the flimsiest of evidence."

B. The Constitution forbids retroactive elimination of the intent requirement for denaturalization.

Assuming that *Fedorenko* does authorize denaturalization without proof of intent, the constitutional question remains whether Congress can *retroactively* eliminate the intent element so as to cancel previously-granted citizenships which, when granted, were divestible only upon a showing of fraud.[13]

Several constitutional provisions point to the conclusion that such a retroactive dilution of citizenship rights is impermissible. First, this Court has interpreted the Citizenship Clause to mean that, "[o]nce acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government . . . ." *Afroyim*, 387 U.S. at 262. If the 1961 amendment is applied retroactively, however, the rights of then-existing citizens are being "shifted, canceled, or diluted at the will of the Federal Government."

It is no answer, as the court of appeals suggested, that Congress' power to regulate the naturalization process under Art. I, § 8, cl. 4 "includes detailing both the requirements for naturalization and the standards for denaturalization." (App. A15-16). As this Court has stated: "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898). *See also Schneider*, 377 U.S. at 165-66; *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) at 827.

The *Ex Post Facto* and Due Process Clauses also preclude a retroactive addition of an otherwise permissible ground for denaturalization. The court of appeals dismissed petitioner's *ex post facto* argument with the observation that "denaturalization

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[13] Since Fedorenko was naturalized in 1970 (449 U.S. at 497), his case did not involve any question of retroactive application of the 1961 "illegal procurement" amendment.

proceedings are not criminal in nature and do not inflict punishment." (App. A15).[14] The court should have looked behind the labels "civil" and "criminal." As Chief Justice Warren observed in *Trop v. Dulles*, 356 U.S. 86, 94 (1958) (plurality opinion), a case finding a Government cancellation of citizenship penal: "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" Similarly, "[t]he Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).

That denaturalization actions are not labeled "criminal" only begs the question, for "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." (*Id.* at 320). Thus, in *Cummings* this Court employed the *Ex Post Facto* Clause to strike down a Missouri constitutional provision declaring that former Confederate soldiers could not serve as lawyers.

The "circumstances attending and the causes" of this case show that it is penal in nature and thus within the terms of the *Ex Post Facto* Clause. Denaturalization has consequences "more grave than consequences that flow from conviction for crimes," *Klapprott*, 335 U.S. at 611, and "throughout history [has] been used as a punishment." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963). It is sought as a

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[14] *Johannessen v. United States*, 225 U.S. at 242-43, which rejected an *ex post facto* challenge to "illegal procurement," should no longer resolve the question today. It involved an attack on citizenship granted *ex parte*, and the decision coined the outmoded analogy of naturalized citizenship to patents. (*Id.* at 236-41). See p. 17, *supra*. *Johannessen* should be distinguished or overruled on the *ex post facto* issue. *Johannessen* did not address any of the other constitutional challenges to retroactivity that are discussed herein.

punishment here. As the former Director of the Office of Special Investigations and the chief prosecutor in this case explained after leaving the Government, it was "important at OSI that we prove the individual defendant's participation in persecution. There must be no doubt that these people lost their citizenship not because they were immigration chiselers but because they abused and persecuted innocent people . . . . " A. Ryan, *Quiet Neighbors* 342 (1984).

To deprive petitioner of the protections of the *Ex Post Facto* Clause would be particularly ironic here, because the Government failed to prove any personal participation in atrocities. (App. C1-2, C15). Indeed, since the trial court found no material misrepresentation, the Government failed to prove that petitioner was an "immigration chiseler." Because of these failures, the court of appeals was reduced to stripping petitioner of his citizenship based on a later-enacted amendment that would apply with equal force if the alleged disqualifying characteristic had been tuberculosis. We submit that the *Ex Post Facto* Clause has special force where the Government avowedly intends to punish the citizen for past conduct, tries but fails to prove the elements of the "offense" existing when citizenship was granted, and then falls back on a statute enacted later.

In all events, if the civil-criminal distinction is deemed determinative for *ex post facto* purposes, the Due Process Clause of the Fifth Amendment would bar the retroactive application of the "illegal procurement" amendment. While the *Ex Post Facto* Clause is concerned with the imposition of punishment, the Due Process Clause can also prohibit retroactive civil legislation if "the consequences are particularly 'harsh and oppressive.' " *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977), *quoting Welch v. Henry*, 305 U.S. 134, 147 (1938). Whether or not denaturalization imposes "punishment" in a technical sense, it certainly imposes consequences "more grave than consequences that flow from

conviction for crimes." *Klapprott*, 335 U.S. at 611. As this Court stated in *Schneiderman*, 320 U.S. at 160: "A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status."

No more "harsh and oppressive" consequence can be imagined than to have one's American citizenship taken away, to be deported from the land where one has raised a family, and, as would likely be the case here, to be sent to the Soviet Union to be executed or sent to the Gulag. The Due Process Clause forbids these consequences when the denaturalization amendment setting them in motion was not enacted until after citizenship was obtained.

III. THE "ANCIENT DOCUMENT" RULE DOES NOT PERMIT A BALANCING OF SUSPICIONS AS TO AUTHENTICITY AGAINST INDICIA OF GENUINENESS.

Federal Rule of Evidence 901(b)(8) restricts the admission of "ancient documents" to those in "such condition as to create *no suspicion* concerning [their] authenticity." The critical identification exhibit was a purported Nazi personnel record called a *Personalbogen*. (App. C8). Uncontradicted testimony from petitioner's and the Government's document experts established numerous suspicions concerning the *Personalbogen*'s authenticity: between eleven and fifteen erasures occurred on the face of the document, including critical areas such as name, dates at the camp, and physical description; the Government expert had never seen any erasures on any of the other, concededly authentic, *Personalbogen*s he had examined; the photograph had been glued on the document after the original, be it the same or some other, had been removed or become detached; and a mysterious print character, which cannot be matched with any other typeface on the document, now appears on the back of the photograph.

This evidence was conclusive under Rule 901(b)(8), which permits admission of only those ancient documents

whose condition raises "*no* suspicion" as to authenticity. As Judge Weinstein has noted in explaining the requirements of the Rule:

> A document is not free of suspicion if it appears that part of the document was written at a time later than that alleged for the whole, or if it appears that the document has been forged, altered, or tampered with. Erasures, discontinuity of handwriting, or any other change in authorship which is not explained as being consistent with the document's authenticity may cause suspicion.

5 J. Weinstein & M. Berger, *Weinstein's Evidence*, ¶ 901(b)(8)[01] at 901-106 (1983). *See also Stewart Oil Co. v. Sohio Petroleum Co.*, 202 F.Supp. 952, 958 (E.D.Ill. 1962), *aff'd*, 315 F.2d 759 (7th Cir.), *cert. denied*, 375 U.S. 828 (1963).

The district court admitted the document, however, apparently because it found these suspicions outweighed by the presence of a thumbprint the court found to be petitioner's. (App. C10).[15] The court of appeals rejected petitioner's argument that Rule 901(b)(8) expressly forbids such a balancing approach. The appeals court referred to the trial judge's broad discretion in evidentiary matters and stated: "Whether the contents of the document correctly identify the defendant goes to its weight and is a matter for the trier of fact; it is not relevant to the threshold determination of its admissibility." (App. A8).

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[15] Neither the district court nor the appeals court acknowledged the admitted fact that, although petitioner's expert was allowed to conduct age tests on all other parts of the document (which was kept at the Soviet Embassy), he was refused permission to conduct the same tests on the thumbprint, which used ink found "unusual" by the Government expert. The inability to test the damning evidence took on special significance because of the testimony of a KGB defector that, at the time the Soviets published the charges against petitioner and surfaced with the *Personalbogen*, the KGB was falsely accusing other Baltic emigres as "war criminals" and was releasing forged and tampered documents to support the charges.

The court of appeals erred in sanctioning a balancing approach under Rule 901(b)(8) and in holding that the suspicions established by the evidence went to weight rather than admissibility. The proper interpretation of a seldom used evidentiary rule would not, of course, normally warrant review by certiorari. Here, however, all questions of law and fact—including admissibility of evidence—are governed by *Schneiderman*'s admonition to resolve all doubts in favor of the citizen. Since similar questions concerning ancient documents are recurring issues in other denaturalization cases, certiorari is appropriate.

IV. DENATURALIZATION DEFENDANTS SHOULD HAVE THE RIGHT TO A TRIAL BY JURY.

The court of appeals rejected petitioner's constitutional claims to a jury, declining to distinguish this Court's decision in *Luria v. United States*, 231 U.S. 9 (1913). *Luria*, however, is premised on discredited conceptions of naturalized citizenship and is inconsistent with the historical evidence that, when the Seventh Amendment was adopted, English law insured the right to a jury trial in the most closely analogous cases. Moreover, *Luria* never considered whether Article III, § 2 and the Fifth and Sixth Amendments guarantee a jury trial in denaturalization cases. Petitioner submits that they do, and that *Luria* should now be distinguished or overruled.

A. *Luria* no longer controls the Seventh Amendment issue.

Luria involved what the Court called "merely colorable" citizenship obtained in 1884 by *ex parte* application, as one obtains a patent. (231 U.S. at 24). *See also* Comment, *Pre-Statutory Denaturalization*, 35 Cornell L.Q. 120 (1949). The Court reasoned that, as in a patent-cancellation case, the Seventh Amendment required no jury. (231 U.S. at 27-28).

In 1906, however, Congress changed naturalization to a judicial proceeding against the Government. *See* 8 U.S.C.

§ 1447. Petitioner acquired his citizenship by this means, a process this Court has called a "solemn adjudication." *Schneiderman*, 320 U.S. at 125. A modern citizenship certificate amounts to much more than "an instrument granting political privileges." Today's citizenship is a "precious right," *Schneiderman*, 320 U.S. at 125, and a "priceless treasure," *Fedorenko*, 449 U.S. at 507. Accordingly, this Court has already suggested that the patent analogy no longer fits this kind of citizenship. *Schneiderman*, 320 U.S. at 124 n.3. This Court should accept review of this case and hold explicitly that *Luria*'s patent analogy is no longer valid and no longer determines whether right to a jury is required. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

Under a modern understanding of naturalized citizenship, the Seventh Amendment bars the Government from denaturalizing and deporting citizens without a jury. The Seventh Amendment "preserve[s] the right to jury trial as it existed in 1791." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979), *quoting Curtis v. Loether*, 415 U.S. 189, 193 (1974); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935). As understood on both sides of the Atlantic in 1791, the common-law guarantee of jury trial covered any Government effort to take a citizen's rights and deport him. As this Court summarized in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 186 (footnote omitted):

> Dating back to Magna Carta . . . it has been an abiding principle governing the lives of civilized men that "no freeman shall be taken or imprisoned or disseised or outlawed or exiled . . . without the judgment of his peers or by the law of the land."

Blackstone confirms that, unlike in France or Turkey, where judges could "exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure," under English law banishment, exile, and transportation were punishments for crimes only proved at a trial by jury. 4 W. Blackstone, *Commentaries on the Laws of England* 343, 368-70 (1769) (Facs. ed. Chicago, 1979).

Indeed, one of the principal complaints against the King and Parliament at the time of the Revolution was that the royal government had subverted the jury trial by "extending the jurisdiction of courts of admiralty" to cases in which Americans accused of wrongdoing could be taken from their homeland and imprisoned abroad. *Documents Illustrative of the Foundation of the Union of the American States*, H.R. Doc. No. 398, 69th Cong., 1st Sess. 12, 23-24 (1927).

In short, because the situation most closely analogous to denaturalization was a criminal proceeding in which, as 1791 Americans understood, a jury was guaranteed by English law, the Seventh Amendment also requires a jury. *Pernell v. Southall Realty*, 416 U.S. 363, 376-81 (1974). When the jury right was threatened in these analogous cases, Americans rebelled. This Court should restore that right to naturalized American citizens.

B. Article III, § 2 and the Sixth Amendment guarantee a jury trial.

When the Government proceeds against an individual on a cause "essentially penal in nature," Article III, § 2 and the Sixth Amendment to the Constitution guarantee right to trial by jury. *Kennedy v. Mendoza-Martinez*, 372 U.S. at 164 (expatriation case). Under the seven-part test of *Mendoza-Martinez*, the Government's pursuit of petitioner is "essentially penal."

First, the denaturalization sanction involves an affirmative disability or restraint—indeed, loss of "the right to have rights." *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting). *Second*, it has historically been regarded as a punishment. *Mendoza-Martinez*, 372 U.S. at 166-67. *Third*, it is invoked, at least as to fraudulent procurement, only upon a finding of *scienter*. *Fourth*, denaturalization promotes the aims of retribution and deterrence. *See* A. Ryan, *Quiet Neighbors* 342 (1984). *Fifth*, the behavior leading to denaturalization (fraudulent procurement) is already a crime. 18 U.S.C. § 1425. *Sixth*, although denaturalization also can serve the alternative

purpose of insuring the integrity of the naturalization process, *seventh*, the denaturalization sought here—that is, denaturalization without proof of an intentional misrepresentation—is excessive in relation to this alternative purpose.[16]

If the Government is to proceed in such an "essentially penal" case, the citizen should have every opportunity to protect his liberty. As Justice Frankfurter observed, "[t]he history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). We urge the Court to use this case to decide that the liberty of naturalized Americans deserves the protection of trial by jury.

C. The Due Process Clause guarantees a jury trial.

Denaturalization proceedings must comport with due process. *Cf. Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922). Recognizing the paramount interests at stake, the Court has progressively required the stricter, criminal-law procedural safeguards in such actions.[17] The Court should now add that due process also requires the protection of trial by jury, a question never previously considered by this Court. *Cf. Duncan v. Louisiana*, 391 U.S. 145 (1968) (due process requires jury trials in state criminal prosecutions).

This Court's three-part test to measure due process claims confirms petitioner's right to a jury. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). First, the "private interests" affected by the Government's effort to strip an individual of his

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[16] As this Court noted, all seven factors need not point in the same direction to determine that a cause is essentially penal. *Mendoza-Martinez*, 372 U.S. at 169.

[17] *Schneiderman*, 320 U.S. at 160 (the Government is limited, as is a criminal proceeding, to matters charged in the complaint); *Klapprott*, 335 U.S. at 612 (as in a criminal case, the Government must satisfy its burden of proof even where defendant absent). *See also* Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?* 40 Md.L.Rev. 39 (1981).

citizenship are substantial: his life and his liberty. In no other case with the stakes this high for the individual may the Government proceed without a jury. Second, a bench trial poses an unacceptable "risk of an erroneous deprivation" of the defendant's interests. As Justice Stevens has observed, the facts in these cases may create "a sort of 'hydraulic pressure' that tends to distort our judgment." *Fedorenko*, 449 U.S. at 538 (Stevens, J., dissenting).

It is no answer to say, as did the court of appeals, that "due process [is] satisfied by a fair trial before an impartial decisionmaker." (App. A18). Under that reasoning, due process would never require a jury. But, as this Court has stated:

> The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . Beyond this, the jury trial provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan v. Louisiana, 391 U.S. at 156. *See also Singer v. United States*, 380 U.S. 24, 31 (1965).[18]

Third, no "government interest" outweighs the defendant's need for a jury trial. Guaranteeing naturalized citizens right to trial by jury would impose no significant burden on the

[18] Jury trial procedures also reduce the risk of an erroneous conviction by dividing the legal and fact-finding functions. In jury trials, judges must rule expressly on the admissibility of each piece of contested evidence; the trier of fact never sees inadmissible evidence and thus never has to ignore what is already known. Fed.R.Evid. 103.

Government. Any additional cost would be insubstantial in light of the issues involved and would fall as much on the defendant. "[L]ittle inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters." 4 W. Blackstone at 343-44.

Moreover, "[i]n striking the appropriate due process balance the final factor to be assessed is the *public* interest," not exclusively the Government's interest as prosecutor. *Mathews v. Eldridge*, 424 U.S. at 347. The public interest calls for a jury in these cases, which "deal with 'judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.'" *Chaunt*, 364 U.S. at 353, *quoting Baumgartner*, 322 U.S. at 671. Basic principles of our democracy demand citizen involvement in judgments like these: "Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan v. Louisiana*, 391 U.S. at 156. Appropriately, citizen jurors should decide, in the first instance, whether the Government has proved that a fellow citizen should lose this "precious right."

Conclusion

For the foregoing reasons, petitioner, Liudas Kairys, respectfully requests that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee/Cross-Appellant,

v.

Liudas KAIRYS,
Defendant-Appellant/Cross-Appellee.

Nos. 85-1314, 85-1397.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 13, 1985.

Decided Jan. 27, 1986.

Before CUMMINGS, Chief Judge, BAUER and FLAUM, Circuit Judges.

CUMMINGS, Chief Judge.

The defendant, Liudas Kairys, appeals an order of the United States District Court for the Northern District of Illinois revoking his citizenship pursuant to 8 U.S.C. § 1451(a). *United States v. Kairys*, 600 F.Supp. 1254 (1984). Section 1451(a) allows for revocation of citizenship that was "illegally procured"[1] or "procured by concealment of a material fact or by willful misrepresentation."[2] We affirm.

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[1] Naturalization is illegally procured if any statutory requirement is not met at the time naturalization is granted. *Fedorenko v. United States*, 449 U.S. 490, 506, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981); H.R.Rep. No. 1086, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 2950, 2983. An applicant must enter the United States pursuant to a valid visa to obtain citizenship. An applicant ineligible under the immigration laws cannot obtain a valid visa. 8 U.S.C. §§ 1427(a), 1429.

[2] In pertinent part, 6 U.S.C. § 1451(a), as amended in 1961, provides:

(Footnote continued on following page.)

Statement of the Case and Facts

Denaturalization proceedings were commenced against Kairys on August 13, 1980, by the United States Justice Department. The government brought three pertinent counts against him under § 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a) (as amended in 1961). Count I charged willful misrepresentation or concealment of a material fact in defendant's petition for naturalization; Count II charged illegal procurement of naturalization because defendant's service as a Nazi camp guard made him ineligible for a visa; and Count III charged illegal procurement of citizenship due to willful misrepresentations in obtaining his visa. The district court entered an order under Count II revoking Kairys' citizenship[3] and dismissed the remaining four counts. Kairys appealed and the government cross-appealed on the dismissal of Counts I and III.

(Footnote continued from preceding page.)

> It shall be the duty of the United States Attorneys . . . to institute proceedings . . . in the judicial district in which the naturalized citizen may reside at the time of suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation. . . .

[3] The Displaced Persons Act of 1948 (DPA), Pub.L. No. 80-774, § 2, 62 Stat. 1009, *amended by* Pub.L. No. 81-555, 64 Stat. 219 which authorized Kairys and other European refugees to emigrate to the United States, specifically excluded individuals who had "assisted the enemy in persecuting civil[ians]." In *Fedorenko*, the Supreme Court held as a matter of law that service as a Nazi concentration camp guard equaled persecution of civilians for purposes of the DPA without proof of personal involvement in atrocities (449 U.S. at 512-513 n. 34, 101 S.Ct. at 750 n. 34), and the outcome here must be the same because service in a Nazi labor camp was similar to service in a Nazi concentration camp. This case does not present "difficult

(Footnote continued on following page.)

The main issue at trial was the defendant's identity—was Kairys the person the government claimed him to be?[4] The defendant contends that he is Liudas Kairys born in Kuanas, Lithuania, on December 20, 1924. As a child he moved to Svilionys, Lithuania, where he completed four years of grammar school. His schooling continued in Svencionys, Lithuania, and he then completed three years of secondary education in Vilnius, Lithuania. Defendant asserts that between 1940 and 1942 he worked on a farm in Radviliskis, Lithuania, and that in 1942 he was captured and sent to the Hammerstein prisoner of war (POW) camp.[5] The defendant claims he was a forced laborer in various locations throughout Lithuania and Poland for the remainder of the war.

The government, on the other hand, maintains that the defendant is Liudvikas Kairys born in Svilionys, then Polish, on December 24, 1920. He joined the Lithuanian army, which merged with the Russian army in 1939. The government contends that some time before March of 1940 Kairys moved to

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(Footnote continued from preceding page.)

line-drawing problems" (*id.*), for, as in the *Fedorenko* camps, labor camp guards were issued uniforms, armed with guns, paid a stipend, and allowed to leave camp on furlough (*id.*). Once a court finds that Kairys was a Nazi labor camp guard, it follows that his subsequent naturalization was illegally procured, see *Fedorenko,* 449 U.S. at 512-515, 101 S.Ct. at 750-52. Thus, by virtue of his service at the Treblinka labor camp, Kairys failed to obtain a valid visa, which is a statutory prerequisite to naturalization, 8 U.S.C. §§ 1427(a), 1429.

[4] Because this case involves the identity of an individual before and during World War II, the significance of some facts depends on the history of that era. The district court's opinion has provided a clear and thorough historical basis for the facts of this case (see 600 F.Supp. at 1256-1258), so that we do not need to repeat it here.

[5] The defendant was captured when the Germans invaded Poland. The Germans also took control of those parts of Lithuania under Polish sovereignty.

Vilnius, Lithuania, and obtained Lithuanian citizenship.[6] During the German invasion of Poland, Kairys was captured and placed in the Hammerstein POW camp. In June of 1942 he was recruited by the Nazis and sent to training camp at Trawniki, Poland. In March of 1943 Kairys was transferred to the Treblinka labor camp in Poland to serve as a Nazi camp guard, where he remained until the camp was closed in July 1944 when the Russians advanced into Poland. At some point during his service he was promoted to *Oberwachmann* of his Nazi guard unit.

The defendant argues that to be ineligible for a visa under the DPA, the government must show personal involvement in atrocities. However, the Supreme Court resolved that issue in *Fedorenko*, holding that disclosure of service as an armed camp guard results in ineligibility as a matter of law without a showing of individual involvement in persecutions. 449 U.S. at 510 n. 32, 512, 513, 101 S.Ct. at 749 n. 32, 750; see also *United States v. Kairys*, 600 F.Supp. at 1265 and n. 5. Because we find nothing significant to distinguish armed guard service at a labor camp from such service at a concentration camp, there is no need to show that Kairys was personally involved in persecution.

Although the Supreme Court notes that Fedorenko had testified to shooting in the direction of escaping prisoners, 449 U.S. at 512 n. 34, 101 S.Ct. at 750 n. 34, this was to distinguish Fedorenko's position as a camp guard from those concentration camp *survivors* who were forced to perform tasks within the camp. Thus in cases not involving armed guards such as defendant, a showing of personal involvement in persecutions

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[6] The necessity of Kairys' obtaining Lithuanian citizenship relates to the dispute over his birthplace. If Kairys was born in Kuanas, he would have been a Lithuanian citizen by birth. If, however, he was born in Svilionys, his 1920 birth would not be sufficient for citizenship because Svilionys was under Polish sovereignty at that time.

may be necessary. Nonetheless, *Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution.

Both parties are in agreement as to what transpired after the war. Kairys worked as a farm laborer in Wiesent, Germany. In 1947 he entered the United States Army Labor Service Corps. Kairys applied for a visa in April of 1949, which was granted shortly thereafter. In May of 1949 he arrived in Chicago where he has since resided. In 1957 Kairys applied for naturalization, the petition was approved and the district court granted him citizenship later that year. From 1951 to the present Kairys has held one job in Chicago, has married and has two daughters. He is active in community and Lithuanian community affairs.

Kairys raises several issues on appeal. First, he contends there is insufficient evidence in the record to uphold the district court's finding that he was a Nazi labor camp guard at Treblinka. Second, Kairys raises various issues concerning the retroactive application of a 1961 amendment to the Immigration and Nationality Act. Third, he contends that the illegal procurement standard of § 1451(a) violates equal protection. Fourth, he argues that laches should bar the government's action. Finally, he claims he has the right to a jury trial.[7]

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[7] Kairys raises one further issue in his brief, *viz*, that the cooperation between the United States government and the Soviet Union denied him access to documents and witnesses, violating his right to due process. We see no merit in this contention. There is simply nothing in the record to support the claim of a due process violation. Although there may be some situations where involvement of the Soviet Union should result in close examination of the discovery proceedings, see, *e.g.*, *United States v. Kowalchuk*, 773 F.2d 488, 493-94 (3rd Cir. 1985) (Aldisert, J., dissenting), that situation is not before this Court.

I. SUFFICIENCY OF THE EVIDENCE

The government's burden of proof in a denaturalization case is heavy. The government must prove its case by "clear, convincing, and unequivocal" evidence and not "leave the issue in doubt."[8] *Fedorenko v. United States,* 449 U.S. 490, 505, 101 S.Ct. 737, 747, 66 L.Ed.2d 686 (1981) (quoting *Schneiderman v. United States,* 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796 (1943)); *Costello v. United States,* 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961); *Chaunt v. United States,* 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960). Our review of the district court's findings is conducted under the clearly erroneous standard of Fed.R.Civ.P. 52(a). *United States v. Koziy,* 728 F.2d 1314, 1318-1319 (11th Cir. 1984), certiorari denied, —— U.S. ——, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984); *United States v. Demjanjuk,* 680 F.2d 32, 33 (6th Cir. 1982), certiorari denied, 459 U.S. 1036, 103 S.Ct. 447, 74 L.Ed.2d 602 (1982); Here the district court found from the evidence presented that "beyond any reasonable doubt . . . the defendant is Liudvikas Kairys, born in Svilionys [then Polish] on December 24, 1920, who later became a resident of Vilnius, a Lithuanian citizen and ultimately an *Oberwachmann* at Tre-

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[8] The phrasing of the standard is somewhat confusing. At oral argument counsel for the defendant implied that this test could be higher than the criminal "beyond a reasonable doubt" standard. On its face, the standard seems to imply that the issue should be doubt-free before finding for the government, whereas the criminal standard allows a reasonable doubt. It is clear that the Supreme Court intended a strict standard, see *Schneiderman,* 320 U.S. at 125, 63 S.Ct. at 1336, but not to the extent that it would surpass the criminal standard. The Court in *Schneiderman* simply articulated the standard as the clear, convincing, and unequivocal rather than the "mere preponderance" standard. *Id.* 320 U.S. at 125, 63 S.Ct. at 1336 (quoting *Maxwell Land-Grant Case,* 121 U.S. 325, 381, 7 S.Ct. 1015, 1029, 30 L.Ed.2d 949 (1887)). Thus we hold the evidence justifying revocation must be clear, convincing, and unequivocal. *United States v. Kowalchuk,* 773 F.2d 488, 493 (3rd Cir. 1985).

blinka labor camp" and thus his citizenship was illegally procured. 600 F.Supp. at 1262. We hold that the court's factual findings are not clearly erroneous.

Kairys' argument focuses on the accuracy and admissibility of a *Personalbogen*, which is a German Waffen Schutzstaffel (SS) identity card. The government relied in part on the *Personalbogen* to establish its version of the defendant's identity. The district court admitted the *Personalbogen* under Federal Rule of Evidence 901(b)(8). The defendant argues that the admission of the document was error, claiming that it is a forgery fraught with inaccuracies, erasures, inconsistencies, and unexplained problems. The government counters that the defendant failed to produce any substantive evidence that the document was anything other than what it was purported to be—the defendant's Nazi SS personnel card.

A. *Admissibility*

Federal Rule of Evidence 901(b)(8) governs the admissibility of ancient documents. The Rule states that a document is admissible if it "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered." The question of whether evidence is suspicious and therefore inadmissible is a matter of the trial court's discretion. *United States v. Bridges*, 499 F.2d 179 (7th Cir.1974), certiorari denied, 419 U.S. 1010, 95 S.Ct. 330, 42 L.Ed.2d 284 (1974). We see no error here.

Although the Rule requires that the document be free of suspicion, that suspicion goes not to the content of the document, but rather to whether the document is what it purports to be. As Rule 901(a) states: "The requirement of authentication ... as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." In other words, the issue

of admissibility is whether the document is a *Personalbogen* from the German SS records located in the Soviet Union archives and is over 20 years old. Whether the contents of the document correctly identify the defendant goes to its weight and is a matter for the trier of fact; it is not relevant to the threshold determination of its admissibility. *Koziy,* 728 F.2d at 1322.

The defendant does argue that a question was raised about whether the document was actually an original *Personalbogen.* First, the defendant raises general allegations that the Soviet Union routinely disseminates forged documents as part of propaganda campaigns. Next the defendant contends that the thumbprint ink was "unusual" and that it could have been placed on the document by mechanical means. But government witnesses testified that the only likely way for the print to appear on the *Personalbogen* was from the defendant's pressing his thumb to the paper. Additionally, the defendant notes that the government failed to establish the proper chain of custody from Treblinka to the Soviet archives. However, it is not necessary to show a chain of custody for ancient documents. Rule 901(b)(8) merely requires that the document be found in a place where, if authentic, it would likely be. All that is left, then, is the vague allegation that the Soviet Union regularly releases forged documents. That is not sufficient to make the document suspicious for purposes of admissibility.

There was sufficient evidence in the record that the document was a German SS *Personalbogen.* It matched other authenticated *Personalbogens* in form, 600 F.Supp. at 1261; it was found in the Soviet Union archives, the depository for German SS documents, *id.*; and its paper fiber was consistent with that of documents more than 20 years old, *id.* at 1260. Its admission was not error.

B. *Sufficiency of Evidence*

The defendant points to numerous supposed problems with respect to the evidence presented by the government.

First, he claims that the *Personalbogen* is inaccurate and inconsistent and therefore unreliable. For example, he notes that the document misstates his hair and eye color as dark blond and grey, respectively, when he claims they are black and blue, respectively.[9] The defendant also claims that other personnel records are inaccurate or of questionable reliability; for example, he notes that the promotion documentation is backdated and therefore unreliable. The defendant further argues that the absence of certain testimony reflects the weakness of the government's case, for example, the absence of eyewitness survivors to identify Kairys as a camp guard. Finally, the defendant points to his introduction of a temporary identity card that places him in Radviliskus and other Lithuanian cities (rather than Trawniki and Treblinka in Poland) during the war period.

Despite Kairys' protests, the record supports the district court's findings.[10] There is sufficient testimony and other evidence for the trial court to have found that the *Personalbogen* correctly identified the defendant as a Nazi labor camp guard at Treblinka. The district court relied primarily on the fact that defendant's thumbprint appears on the identity card, supported by expert testimony that the signature on the card was the defendant's. 600 F.Supp. at 1262. In addition, other camp

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[9] Although the defendant now claims his hair to be black, several documents in the record filled out by Kairys himself describe his hair color as brown. The discrepancy between dark blond and brown is quite a bit smaller than between dark blond and black.

[10] It is important to note that most of the defendant's major factual contentions fail when presented with the record. For instance, in his brief Kairys notes that the *Personalbogen* indicates that the holder of the card has a scar on his left hip, but claims that a doctor testified that the defendant has no scar on his hip. What defendant fails to disclose is that the doctor did testify that Kairys has a scar about one inch above the left hip, an area that a layperson could describe as "hip." See also *supra* note 9.

guards placed a Kairys at Treblinka, some of whom identified the defendant's picture. A witness testified that he observed Kairys in a German SS uniform in late 1943 or early 1944. Promotion and other personnel records indicate that a Kairys trained at Trawniki, was transferred to Treblinka, and was promoted to *Oberwachmann*. Finally, personal records, such as a baptismal certificate and a newspaper citizenship notice, fix the defendant's birth date as December 24, 1920, and birthplace as Svilionys (then under Polish sovereignty), rather than December 20, 1924, in Kuanas, Lithuania. These were all credibility determinations for the trier of fact to make. We cannot say that the district court was clearly erroneous in deciding the facts as it did.

II. THE 1961 AMENDMENT

A. *Retroactivity*

The defendant raises the general issue of whether the 1961 amendment, which re-added the "illegal procurement" standard for denaturalization to 8 U.S.C. § 1451(a) (see note 12 *infra*), should apply to him since his 1957 grant of citizenship was prior to that amendment. Defendant makes two arguments: first, retroactive application of the 1961 amendment violates general rules of statutory construction; and second, retroactive application of the illegal procurement standard violates the *ex post facto* clause of the Constitution.

1. *Statutory Construction*

Kairys argues strongly that retroactive application of the illegal procurement standard violates statutory construction principles. Legislative enactments are presumed to be prospective absent clear statements by Congress to the contrary. See *United States Fidelity and Guaranty Co. v. United States,* 209 U.S. 306, 314, 28 S.Ct. 537, 539, 52 L.Ed. 804 (1908); *South East Chicago Cm. v. Department of Housing & Urban Development,* 488 F.2d 1119 (7th Cir.1973). The district court ruled that the statute was remedial and thus was not being applied

retroactively, 600 F.Supp. at 1268. Although we disagree with the district court's categorization of the amendment as merely remedial, we affirm on the basis that sufficient evidence of congressional intent exists to apply the amendment to pre-1961 naturalizations.

In order for a statute to be considered remedial it must be one that neither enlarges nor impairs substantive rights but relates to the means and procedures for enforcement of those rights. *Bagsarian v. Parker Metal Co.*, 282 F.Supp. 766 (N.D. Oh.1968). In *French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir.1981), a products liability act was held to be remedial because it created no new causes of action or substantive rights or liabilities. Similarly, in *Czubala v. Heckler*, 574 F.Supp. 890, 897 (D.C. Ind.1983), a statute that outlined procedures for remand due to new and substantial evidence was held remedial. But a New York statute that created a private cause of action for unfair and deceptive practices was held not remedial because it created an entirely new right of action and greatly expanded liability, changing the rights and liabilities of the parties. *Buccino v. Continental Assurance*, 578 F.Supp. 1518 (S.D.N.Y. 1983).

Likewise, the amendment to § 1451(a) goes beyond merely affecting procedural mechanisms and alters the rights of naturalized citizens. Although the district court is correct in stating that the statute applies to denaturalization proceedings rather than the granting of the substantive right, 600 F.Supp. at 1268, it can hardly be characterized as not impairing the right of citizenship held by naturalized individuals. The "illegal procurement" amendment operates to divest an individual of the prized status of citizenship when prior to its 1961 passage that right was vested after 1952 (see *infra* note 12). See *Schneiderman*, 320 U.S. at 122, 63 S.Ct. at 1335. Therefore, the inquiry is whether the amendment changes the legal consequences of acts completed before its effective date. *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 965, 67 L.Ed.2d

17 (1981). Here most certainly the legal consequences of Kairys' being a Nazi camp guard at Treblinka has changed; between 1952 and 1961 there was no "illegal procurement" standard so that the government could not use that standard to denaturalize Kairys, whereas since 1961 the government could use that standard to deprive him of citizenship.

It remains to determine whether Congress has expressed sufficient intent to apply the 1961 "illegal procurement" amendment retroactively, as the government contends. As already noted, statutes are to be construed as prospective unless otherwise stated. *Greene v. United States*, 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964); *Hospital Employees Labor Program v. Ridgeway Hospital*, 570 F.2d 167, 169-170 (7th Cir. 1978); *South East Chicago Cm.*, 488 F.2d 1119; IA C. Sands, *Sutherland on Statutory Construction*, § 22 at 200 (4th ed. 1972). This rule is even more appropriate when the statute affects vested rights. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 720-721, 94 S.Ct. 2006, 2020-21, 40 L.Ed.2d 476 (1974).

Nonetheless several factors demonstrate congressional intent to apply the amendment to pre-1961 grants of citizenship. The district court found the strongest indication of such intent in 8 U.S.C. § 1451(i), which states that the entire provisions of § 1451 are to be applied to "any naturalization granted under this subchapter" and to "any naturalization heretofore granted."[11] Therefore, when Congress amended § 1451(a) it was already a retroactive subsection by virtue of subsection (i). To emphasize, the amendment was placed in a section already

[11] 8 U.S.C. § 1451(i) provides:

> The provisions of this section shall apply not only to any naturalization granted and to certificates of naturalization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court. . . .

governed by a separate provision for retroactivity, a provision of which Congress was presumably aware when passing the amendment to § 1451(a). This interpretation is consistent with the purpose of the illegal procurement provision. Congress reinserted[12] the illegal procurement standard in § 1451(a) in order to effectuate the purposes of both the naturalization and denaturalization statutes. See H.R.Rep. No. 1086, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.Code Cong. & Admin.News 2950, 2982-2984. Congress did not want individuals who were not properly qualified or had not properly completed the required initial steps to acquire and retain American citizenship. It would be completely illogical to conclude that Congress intended the illegal procurement denaturalization standard to apply to pre-1952 Act and post-1961 Act naturalizations and not to others such as this 1957 grant. That conclusion would serve to make the denaturalization requirements ineffective for naturalized citizens such as the defendant. Given this broadening of the statute's scope (by reinserting the illegally procured standard into § 1451(a)) Congress surely did not mean to create a loophole class of people who would not be subject to the new (1961) version of the statute. See *Hutchinson v. Commissioner,* 765 F.2d 665, 669 (7th Cir.1985).

Finally, when Congress wished to make provisions prospective in the 1961 Act (of which this amendment to

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[12] Illegal procurement subsections had already been incorporated into preceding denaturalization statutes. See § 15, Act of June 29, 1906, 34 Stat. 596, 601; § 338(g), Nationality Act of 1940, 54 Stat. 1137, 1160. In the 1961 Act Congress readded the "illegally procured" language to the prior § 1451(a) language "procured by concealment of a material fact or willful misrepresentation." The "illegally procured" language had been inexplicably and apparently inadvertently dropped from the 1952 Act. See *United States v. Stromberg,* 227 F.2d 903 (5th Cir.1955).

§ 1451(a) is a part) it expressly did so,[13] still another indication that the provision at issue was meant to be retroactive. Therefore, we are unwilling to ascribe a contrary intent to Congress by giving the 1961 "illegal procurement" amendment only a prospective effect.

2. *Ex Post Facto*

The defendant argues that the retroactive application of the 1961 amendment to his 1957 citizenship violates the constitutional prohibition against *ex post facto* laws, U.S. Const. art. I, sec. 9, cl. 3. The defendant's argument is unpersuasive.

Denaturalization is a civil rather than criminal proceeding. See *Fedorenko,* 449 U.S. at 516, 101 S.Ct. at 752; *Schellong v. United States,* 717 F.2d 329, 336 (7th Cir.1982), certiorari denied, 465 U.S. 1007, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984). Additionally, the purpose of the denaturalization statute is not to punish citizens, but to protect the integrity of the naturalization process. *Fedorenko,* 449 U.S. at 506-507, 101 S.Ct. at 747-48. Although sometimes harsh, § 1451(a) merely works to effectuate the intentions of Congress that only those qualified may become and remain citizens. Specifically, the denaturalization statute does not punish naturalized citizens for post-naturalization acts, and for this reason the cases cited by Kairys are distinguishable. See *Trop v. Dulles,* 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958); *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). The Supreme Court recognized in *Johannessen v. United States* that a denaturalization proceeding imposes no new penalties and does not make unlawful that which was previously lawful. 225 U.S. 227, 242-243, 32 S.Ct. 613, 617-18, 56 L.Ed. 1066 (1912). Rather it works to deprive the naturalized citizen of a privilege that should never have been bestowed. *Id.*; see also *Koziy,* 728

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[13] See §§ 17 and 19, Pub.L. No. 87-301, 75 Stat. 656; H.R.Rep. No. 1086, 87th Cong., 1st Sess. 38-41 (dealing with petitions for naturalization and loss of United States citizenship, respectively).

F.2d at 1320 ("The utilization of illegal procurement deprived Koziy of a privilege that was never rightfully his.").

Because denaturalization proceedings are not criminal in nature and do not inflict punishment, the retroactive application of the amendment does not violate the prohibition against *ex post facto* laws.

B. *Equal Protection*

The defendant also asserts that the illegal procurement standard violates the equal protection clause of the Fifth Amendment. His reasoning is that because intentional and voluntary acts are required for expatriation of native-born citizens, *Afroyim v. Rusk,* 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967); *Schneider v. Rusk,* 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964), intentional acts must also be the basis for denaturalization of naturalized citizens. This argument, however, ignores the intrinsic differences between the two types of citizenship, as well as the long history of the illegal procurement standard in denaturalization statutes—upheld by the Supreme Court. See *Fedorenko,* 449 U.S. at 517-518, 101 S.Ct. at 752-53; *United States v. Ness,* 245 U.S. 319, 321, 38 S.Ct. 118, 119, 62 L.Ed. 321 (1917); *United States v. Ginsberg,* 243 U.S. 472, 474-475, 37 S.Ct. 422, 423, 61 L.Ed. 853 (1917); *Luria v. United States,* 231 U.S. 9, 22-24, 34 S.Ct. 10, 13, 14, 58 L.Ed.2d 101 (1913).

American citizenship is a precious right and consequences of its loss may be severe. See *Costello,* 365 U.S. at 269, 81 S.Ct. at 536; *Chaunt,* 364 U.S. at 353, 81 S.Ct. at 149; *Baumgartner v. United States,* 322 U.S. 665, 675-676; *Schneiderman,* 320 U.S. at 122, 63 S.Ct. at 1335. Naturalization is not a second-class status. *Schneider v. Rusk,* 377 U.S. 163, 165-166, 84 S.Ct. 1187, 1188-89, 12 L.Ed.2d 218 (1964). The Fourteenth Amendment provides that all citizens are equal, whether native or naturalized. U.S. Const. amend. XIV. Congress has the power to regulate the naturalization process, U.S. Const. art. I, § 8, cl.

4,[14] which includes detailing both the requirements for naturalization and the standards for denaturalization.

Section 1451(a) is a proper exercise of Congress' power to set the requirements for naturalization and to authorize denaturalization in the event of noncompliance. It does not act unequally upon naturalized citizens to remove their citizenship when they have failed to comply with the requirements of naturalization. *Luria,* 231 U.S. at 24, 34 S.Ct. at 13 (illegal procurement "makes no discrimination between the rights of naturalized and native citizens"). Rather the difference in treatment is due to the inherent differences in the two types of citizenship; for natives there are no pre-citizenship acts to prescribe.

The cases cited by the defendant are inapplicable. *Schneider* and *Afroyim* do stand for the propositions that naturalized and native citizens must be treated equally and that before any citizen can be expatriated or denaturalized there must be a voluntary and intentional act. But this standard applies only to acts committed after citizenship. Because there are no analogous pre-citizenship requirements for native-born individuals, naturalized citizens are not being treated any differently than their intrinsic differences require.

Furthermore, the Supreme Court in *Fedorenko* continued its acceptance of illegal procurement as a basis for revocation of citizenship both by using that standard as a basis for its decision, 449 U.S. at 515, 101 S.Ct. at 751, and by references to *Ginsberg* and *Ness,*[15] 449 U.S. at 517-518, 101 S.Ct. at 752-53. Moreover, the Court, recognizing the facial inconsistency, reconciled the diverging concepts of *Schneider-Afroyim* and

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[14] The Constitution empowers Congress to "establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4.

[15] Both *Ginsberg* and *Ness* were Supreme Court decisions that upheld denaturalizations of citizens under the 1906 illegal procurement standard; both involved unintentional acts before citizenship.

Ginsberg-Ness. Id. at 505-507, 101 S.Ct. at 746-48. Because Kairys' argument is inconsistent with this controlling Supreme Court authority, it must fail.

III. LACHES

The defendant protests that this action should be barred by laches. We do not consider it necessary to reach that question because the defendant cannot meet the necessary requirement to assert a laches defense. In *Costello v. United States,* 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961), the Supreme Court addressed the issue of whether or not laches barred the government from proceeding against the defendant in a denaturalization proceeding. There the Court noted that the lower courts had consistently disapproved of the use of laches in denaturalization proceedings, reasoning that laches is not a defense against the sovereign. *Id.* at 281, 81 S.Ct. at 543 and cases cited therein. The Court went on to hold that in any event the defendant had not adequately demonstrated prejudice. *Id.* at 282-283, 81 S.Ct. at 543-44. In this case the district court noted that the defendant would probably fail in meeting the laches standard. 600 F.Supp. at 1264 n. 3. To assert the laches doctrine a party must demonstrate lack of diligence and prejudice. *Costello,* 365 U.S. at 281, 81 S.Ct. at 542. Here the government was unaware of Kairys' illegal presence until 1977. Suit was brought in August of 1980 after a Department of Justice investigation. We agree with the district court that this would not rise to the level of lack of diligence. See also *United States v. Trifa,* 662 F.2d 447 (6th Cir.1981), certiorari denied, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 849 (1982).

IV. JURY TRIAL

The defendant claims that the trial court erred in not granting his request for a jury trial. He asks this Court to overturn past decisions clearly holding that there is no right to a jury in denaturalization proceedings, *Luria v. United States,*

231 U.S. 9, 27-28, 34 S.Ct. 10, 15, 58 L.Ed. 101 (1913); *Schellong,* 717 F.2d at 338. We are not prepared to do so.

This Court reconsidered this issue recently both in *United States v. Walus,* 616 F.2d 283, 304 n. 53 (7th Cir.1980), and in *United States v. Schellong,* 717 F.2d 329, 338 (7th Cir.1983), and has continued to uphold the ruling of *Luria* that there is no right to a jury in denaturalizations because they are proceedings in equity. See *Fedorenko,* 449 U.S. at 516, 101 S.Ct. at 752 (reaffirming that denaturalization actions are equitable in nature). In *Schellong* this Court discussed alternative constitutional bases for a right to jury trial under Article III and the Sixth Amendment. Ultimately this Court concluded that because denaturalization is civil and equitable in nature, due process was satisfied by a fair trial before an impartial decisionmaker. 717 F.2d at 336. We adhere to those holdings.

V. CONCLUSION

For the reasons stated above, the district court committed no error in the proceedings.[16] Accordingly, the order of the district court revoking the defendant's naturalization is affirmed.

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[16] Because we conclude that the defendant's citizenship was illegally procured, as alleged in Count II of the complaint, we do not consider the government's cross-appeal arguments that Counts I and III (alleging willful concealments and misrepresentations of material facts) were improperly dismissed by the district court.

APPENDIX B

APPENDIX B

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 27, 1986.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

Nos. 85-1314 and 85-1397

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

vs.

LIUDAS KAIRYS,
Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 C 4302
James B. Moran,
Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

APPENDIX C

UNITED STATES of America, Plaintiff,

v.

Liudas KAIRYS, Defendant.

No. 80 C 4302.

United States District Court,
N.D. Illinois, E.D.

Dec. 28, 1984.

MEMORANDUM AND ORDER

MORAN, District Judge.

The government here seeks the denaturalization of Liudas Kairys, pursuant to 8 U.S.C. § 1451(a), on the grounds that he secured his immigration and citizenship by misrepresentation and concealment of material facts and because the facts concealed legally barred him from entering the United States at the time of his immigration. The central factual issue in this case is whether the defendant is the person the government contends he is. It is not disputed that in the determination of that factual issue all inferences in the evidence must be drawn as far as reasonably possible in favor of the citizen; and that with those inferences drawn favorably to the accused the government must prove each element of its case by clear, unequivocal and convincing evidence, with the government's proof not leaving the issue in doubt on any element of the case.

Defendant is not charged with war crimes. What is under attack is his status as a citizen. The basis for that attack is his alleged status some forty years ago, as a guard at the Treblinka labor camp. While the government contends that defendant was personally involved, on one or perhaps more occasions, in atrocities, its proof of that, as later more fully discussed, is

insubstantial. What an individual guard by the name of Kairys may or may not have done at that camp is now lost in the mists of time.

It is perhaps helpful to begin by discussing the larger context in which this case arose. That context is historical, with much of it stipulated to by the parties.

In modern times Lithuania has existed as an independent national state only during the period between the World Wars. The district of Vilnius, the historical site of the Lithuanian capital, was originally under Lithuanian sovereignty when it became independent. However, in 1920, it was invaded by Poland and placed under Polish sovereignty. The period between the wars was marked by difficult relations between Poland and Lithuania, in large measure because of the Polish control of Vilnius. Germany, for reasons of its own, gave comfort to Lithuania during that period in its aspirations for a recovery of Vilnius.

In September 1939, following the German-Soviet nonaggression pact, Germany and the Soviet Union invaded and partitioned Poland. The Soviet Union thereafter occupied the eastern portions of Poland, including the Vilnius district. A month later, in October, it returned the City of Vilnius to Lithuanian sovereignty. In June 1940 the Soviet Union invaded and occupied the Baltic states and Lithuania ceased to exist as an independent nation. A year later, on June 22, 1941, Nazi Germany invaded the Soviet Union and Lithuania was rapidly overrun. During the remainder of the war the Germans employed Baltic nationals in paramilitary formations and in other capacities. Their status was not that of Germans but, although subordinate, it was considerably better than that of Poles, Russians, and Jews. The Balts occupied a rung on the Nazi "hierarchical principle of racism," which exploited "the anti-semitic assertion of the existence of a 'worst' people in order properly to organize the 'best' and all the conquered and

oppressed in between . . . so that each people, with the necessary exception of the Jews, could look down upon one that was even worse off than itself." Arendt, *The Origins of Totalitarianism* (1951), p. 241.

In 1942 the Germans initiated "Aktion Reinhard," which was a plan for the systematic total extermination of all Jews in Europe. The German Schutzstaffel ("SS") was in large part responsible for carrying out this plan. One method for carrying out its plans, vis-a-vis Europe's Jews, was Nazi Germany's operation of numerous concentration camps, extermination camps and forced labor camps. The SS was responsible for the operation of these camps.

Although defendant did not so stipulate, it is beyond dispute that the SS recruited numerous Soviet prisoners who were to act as guards. Prisoners deemed politically reliable, such as various Baltic and Ukrainian prisoners, were inducted into guard units known as the SS Wachmannschaft. Many members of those units received training as camp guards at the Trawniki training camp in Poland. Some of the guard units served in the SS Commando Lublin in Poland. That unit had several functions over time, including guarding the Warsaw and Lublin Jewish ghettoes, guarding concentration camps and labor and extermination camps in and around Lublin, and participating in rounding up Jews in the Polish ghettoes and in their subsequent transportation. That guard service included service at the Treblinka labor camp.

The Treblinka labor camp was originally erected in late 1941 or early 1942 as a penal camp for Poles who committed various infractions of Nazi law. After the institution of Aktion Reinhard in 1942 the Germans erected the Treblinka extermination camp a few kilometers from the labor camp. Jews and others from Poland and elsewhere were thereafter sent to Treblinka (in addition to other similar camps) by the tens of thousands. Jewish prisoners sent to Treblinka were selected immediately for either death by gassing at the extermination

camp or, if healthy, for forced labor in the labor camp or extermination camp. Approximately 900,000 Jews were murdered at the Treblinka extermination camp during the period of its existence.

The Treblinka labor camp was under the administration of German SS officers. Food rations for prisoners at the labor camp were inadequate and medical care for prisoners was virtually non-existent. Much of the labor performed by prisoners was exceedingly strenuous, including loading coal at a railroad station, breaking up and transporting stones from a quarry, chopping wood, paving and repairing roads, and loading sand from the banks of a nearby river. Prisoners at the labor camp were forced to work year-round, regardless of the weather. They worked six days a week from early morning until evening. As a result of these conditions the death of prisoners by disease or exhaustion was a weekly, and sometimes a daily, occurrence. Prisoners who became too weak to continue working were killed by members of the guard unit and the German SS. In addition to those deaths, prisoners of the Treblinka labor camp were shot, hanged, beaten or stabbed to death with and without apparent reason by the German SS and the camp's guards. During the course of its operation several thousand Jewish prisoners died at the labor camp. As they died or were killed, they were replaced by new prisoners. The total number of prisoners generally varied between 500 and several thousand, including men, women and adolescents.

While the camp was not a death camp as such, unlike the nearby Treblinka extermination camp, it was anticipated that the prisoners at the Treblinka labor camp would, in due course, die from disease, malnutrition or overwork. As a matter of policy prisoners who could no longer work were—in the evening upon returning from work details—left between the fences on the perimeters of the camp for the purpose of being killed before the following day.

Besides the German SS officers, there were four platoons of non-German SS Wachmaenner, each platoon comprising between 10 and 25 guards. The guards were armed. Only Germans were generally authorized to enter the prisoner compound. The guards resided on the premises nearby and acted generally as perimeter and work detail guards.

The extermination camp was closed in the fall of 1943. In July 1944, as the Soviet army approached the vicinity of Treblinka, the labor camp was abandoned and burned. Over 300 Jewish prisoners were shot at that time, with only 10 to 15 survivors. Members of the guard unit participated in that massacre.

After evacuating Treblinka, the guards retreated westward into Germany. In February 1945 they were in Dresden, where they participated in the search for survivors, the burial of the dead and the clearing of the rubble following the firebombing of the city. From there, as the war came to a close, the unit moved into Czechoslovakia, where it was at the war's end.

The government contends the defendant was born Liudvikas Kairys on December 24, 1920, in the Village of Svilionys, Svencionys County, in eastern Lithuania. That area is in the Vilnius district, then under Polish sovereignty. His father's name was Petro and his mother's maiden name was Maria Meskelyte. Sometime prior to March 1940 defendant moved to Vilnius. In the spring of 1940 a Liudvikas Kairys, son of Petro, born December 24, 1920 in Svilionys Village, and residing in Vilnius, was granted Lithuanian citizenship. A Lyudvik Kayrov, son of Petr and Mariya, nee Meshkel, born December 24, 1920, had previously been baptized in the Village of Svilyany in 1921. The personal data underlying that application for citizenship specifies that Kairys completed a four-grade grammar school in the Village of Svilionys.

According to the government, defendant shortly thereafter entered service in the Lithuanian military. When the Soviet Union invaded and occupied all of Lithuania it absorbed the

Lithuanian military into the Red Army. Defendant remained with his military unit and, within a few days after the invasion, he was captured. At some later time he was taken to the German prisoner-of-war camp in Hammerstein, Pomerania.

Defendant does not seriously dispute that a Liudvikas Kairys, son of Petro, born December 24, 1920 in Svilionys, lived on his parents' farm and thereafter moved to Vilnius where he was granted Lithuanian citizenship on May 4, 1940. The so-called Lithuanian documents, Government's Exhibits 40, 41, 42, 43, 44, 45 and 50, are all admissible as ancient documents, as self-authenticating and, for the most part, as public records. Indeed, no one has seriously questioned their authenticity and defendant testified that the newspaper announcement of the grant of citizenship, containing virtually all the information previously described, was an announcement in a Lithuanian publication. It is defendant's contention, however, that he is not the person referred to in those documents. Handwriting experts were unable to conclude that the signatures on certain of those documents were or were not in the handwriting of defendant.

That contention becomes important because of the evidentiary indications that the person in those documents was later a guard at the Treblinka labor camp. It is the whereabouts of the defendant during the period 1942-1944 that is the principal dispute. The government contends that defendant was recruited from the Hammerstein prisoner-of-war camp in 1942 by the Germans for service to them, that he was thereafter trained at Trawniki and, in July 1942, assigned to the SS Commando Lublin. In March 1943, according to the government, defendant was transferred to the Treblinka labor camp, where he served until the abandonment of camp, thereupon retreating westward with the guard unit. Toward the close of the war he participated with the guard unit in the burial details in Dresden and, again according to the government, was in Prague at the end of the war.

Defendant has consistently maintained that he was born December 20, 1924 in Kaunas. He agrees that his father's name was Petro and his mother's maiden name was Mariya Meskelyte and that he grew up on the family farm in Svilionys. He agrees that he moved to Vilnius and was living there in 1940, although he has testified that he resided there from 1938 on. He denies that he was naturalized in the spring of 1940, which would have been unnecessary if he had been born in Kaunas, which was at all times between the wars under Lithuanian sovereignty. He contends that the Liudvikas Kairys naturalized at that time is someone else, and he is unable to recall anyone of that name in the village, although he related that there were only 128 people there in 1939. His visa application recites that from 1938 to 1944 he was in Radviliskis and other places in Lithuania and from 1944 for a period thereafter was in Leitneritz in Czechslovakia.

In the job application to the company by which he was employed it is recited that he attended grammar school in Kaunas for six years and secondary schools in Radviliskis for four years, a total of ten years, the same period of education as listed on the visa application. In his deposition and trial defendant testified that he attended grammar school in Svilionys for four years, secondary school in Svencionys (near Svilionys) for four years and secondary school in Vilnius for three years. He testified that he was in Radviliskis and Vinuto, Lithuania, in 1941 and early 1942, in the Hammerstein POW camp for the remainder of 1942 and was, for the rest of the war, doing forced labor in Poland and Germany. He further testified that he did participate in the digging out of Dresden after the firebombing and that he was in Prague when the war ended. Finally, the defendant places a great emphasis on DX-1, an identity card purportedly issued in Radviliskis on August 7, 1941, indisputably bearing his signature and photograph. That card indicates that he resided in Radviliskis until May 1942 and then moved to Vinutas. It gives his eyes as blue and

his hair as dark. It cites that he was born in Kaunas on December 20, 1924.

There seems little dispute that defendant lived and worked with a farmer near Regensburg for the period shortly after the war. He thereafter, from October 1946 until February 1947, lived and worked as a farm laborer in the Village of Wiesent. In 1947 defendant entered the United States Army labor service, a civilian auxiliary force made up of displaced persons which performed various services for the American occupation forces.

In April 1949 defendant initiated procedures to immigrate to the United States. A month later he immigrated to this country. In 1957 defendant applied for naturalization, which was granted later that year. Since coming to this country he has led an unremarkable life. He has worked in a blue collar job for the same company almost the entire period of his residence here, has married, has had two children, and has from time to time been involved in Lithuanian cultural affairs. He has testified that his given name has always been Liudas, rather than Liudvikas. Liudas is a diminutive of Liudvikas, and the Germanic version of both is Ludwig.

The government's proof is a combination of testimony and documentary evidence. Given the passage of time, the documentary evidence is far more significant than the witness identifications and GX-32 is by far the most significant document. That document purports to be the "personalbogen" (a German personnel record) for Ludwig Kairys, father's name Peter, birth date December 24, 1920, in "Luilionys". It recites his mother's maiden name as Maria Moshelyte and that he served in the Soviet Army through June 22, 1941. It states that his hair is dark blonde, his eyes are grey, and that there is a scar on his left hip. The document bears a photograph, a thumbprint and a signature. It indicates that he was on furlough from October 1 to October 14, 1942, that he was transferred from

Trawniki to Lublin Commando on July 20, 1942, and that he was transferred to the Treblinka labor camp on March 22, 1943.

Recognizing the importance of the document, defendant has raised a substantial number of reasons why he contends that the document is not authentic, does not refer to him, and should not be admissible. He contends that there are sufficient suspicions raised regarding its authenticity so that it is not admissible as an ancient document, that for the same reason it is not self-authenticating, that it does not come within the public document exception because it is a foreign document and SS documents were not public and that there was insufficient foundation laid by a custodian. Finally, he argues that it cannot be introduced as an admission because it does not bear his signature and the statements in the document are not demonstrably his.

Defendant's attack on authenticity is itself varied. He introduced evidence that the photograph may possibly have been torn off or replaced, that there were indications of pencil marks and erasures, that it could not be conclusively established that it was his signature, that the chemical composition of the paper was such that its production in the immediate post-war period could not be eliminated, that the thumbprint ink was not normal and that the thumbprint could possibly have been placed there by mechanical means. In so contending, he made in reality two arguments: that the document was a forgery or that it referred to a different person. That alternative argument created some logical inconsistencies, *e.g.*, that the photograph was of someone else and had been placed on a forged document as part of a program of disinformation by the Soviet Union, or that the photograph was of a real Liudvikas Kairys who was born in Svilionys in 1920, but was not a photograph of defendant, who is a different person.

This court heard expert testimony on all aspects of that document. That evidence suggests that the photograph may at

some point have been separated from the document through the failure of adhesive. There are pencil marks with typing over them to a considerable extent, and evidence of some erasures, none of which can be conclusively explained at this juncture, although the filling in of information by pencil, subsequently removed upon typing in the information, is a plausible explanation. The paper is old; it is conceivable that it dates from a subsequent time but the testing is consistent with paper in existence during 1942, and the quality of the paper, being poor, is not inconsistent with paper available during war time. One expert believes the signature is that of the defendant; defendant's expert finds enough dissimilarities to raise a doubt as to whether it is the signature of the defendant. Questions arise from the description of hair as dark blonde, of eyes as grey and of the location of a scar on the hip, although the photograph does depict a young man with, like defendant, a crooked nose and of a similar general facial structure. One expert, noting the lack of dissimilarities, believed that the photograph was more probably than not a photograph of defendant, but, given the passage of time, any such photographic identification remains uncertain.

Collectively, those questions might raise an issue as to whether GX-32 by itself proved unequivocally that defendant was a person who served at Treblinka labor camp during the war. However, the document also contains a thumbprint which defendant does not deny is his and which the expert testimony demonstrates conclusively is that of Kairys. The evidence was undisputed that there is no known feasible way for the print to appear on that paper except by a natural person pressing his inked thumb to that paper. Further, no expert testified to the conclusion that the document was not authentic or that it was a forgery. The most that could be said is that certain aspects of the document were open to certain questions. When that evidence is combined with a recognition that the document was properly certified as coming from the Soviet archives—the

repository of virtually all SS and related activities in Poland as the result of the overrunning of Poland by the Soviet armies in the latter days of the Second World War—and the fact that persons who were by their own admission guards at Treblinka labor camp verified their own "personalbogens" in substantially similar form, leads to the indisputable conclusion that the defendant was the person as identified in the "personalbogen."

In these circumstances, the court admits GX-32 as an ancient document and as an admission. *United States v. Kozly*, 728 F.2d 1314, 1321-1322 (11th Cir.1984).

With that, the other documentary evidence falls into place. Defendant concedes that a Kairys may have served at Treblinka. The other so-called Trawniki documents indicate that a Kairys, with some variations in spelling and first name, was a member of the Wachmannschaft in the Lublin District in 1942, that he was promoted to Oberwachmann on August 21, 1942, and that a Ludwig Kairys, born December 24, 1920 in Luilionys, ID No. 1628, was transferred to Treblinka in March 1943. I am persuaded that each of those documents is authentic. They alone, however, do not add much in view of the defendant's concession that there may well have been such a Kairys at Treblinka.

Defendant similarly attacks the testimony of various witnesses and the identification by some of the photograph in GX-32 as being that of the Kairys who served at Treblinka. Latakas, who had grown up with Liudvikas Kairys, testified in a deposition taken in Riga, Latvia, that he had talked with that Kairys at the end of 1943 or the beginning of 1944 during a leave in Svilionys about Kairys' service for the Germans (in the "personalbogen" Kairys' furlough is noted as October 1 through 14, 1942). He identified the photograph in GX-32 as that of the Kairys he knew. Zvezdun, whose deposition was also taken in Latvia, identified a Kairys as his platoon commander and had previously, in a statement to Soviet authorities given in 1980, identified a photograph of defendant as having

similar features to those of the Kairys he knew. Amanaviczius, whose deposition was taken in Belgium, recalled a Kairys as his group commander at Treblinka, and identified his photograph in a picture photo-spread. Paul Fessler, also a guard, testified to a Ludwig Kairys being an Oberwachmann at Treblinka and as being tall and with a crooked nose. Zajanckauskas, who was at both Hammerstein and Trawniki, testified under immunity in Massachusetts. He also recalled there being a Kairys at both places, but could not identify the photograph. Kharkovskii and Vil'shun also testified at Riga that Kairys was at Treblinka but in the former case could not identify the photograph and in the other selected the wrong photo.

Defendant urges that the photo spreads were impermissibly suggestive, that the opportunities to cross examine in Riga respecting bias or improper motivation by the witnesses was unduly restricted and that the passage of time made any photographic identification exceedingly questionable. Finally, he points out that the two survivors who testified had never heard of Kairys while at the camp and could not identify the photograph.

This court concludes that the photo spreads were not impermissibly suggestive and that, given the totality of circumstances, they are entitled to be admitted and considered. At the same time, this court is well aware that people were being called upon to view the photograph of a person that they had not seen for forty years. Were this case to turn on the identification of the defendant by photographs taken forty years ago, there would be no doubt that the evidence that the photograph was of the defendant would not even remotely approach unequivocal and conclusive. The 1944 statement of Rekalo, the 1968 and 1971 statements of Swidersky, and the statements at the Swidersky trial by some of the witnesses in this case that a Ludwig Kairys or an L. Kairys or a Kairys was an Oberwachmann in Treblinka, all substantially undercut any notion that the presence of a Kairys at Treblinka was a recent

fabrication by the witnesses as part of a Soviet disinformation campaign. The witness identification of a photograph as that of the Kairys who was at Treblinka does not, however, take us very much further. While there are no dissimilarities between the person depicted in the photograph and the defendant and each is someone who has had a broken nose, the expert testimony was that, given the passage of time, it can only be said that the photograph is more probably the defendant than not.

Further, while the restrictions on cross examination in Riga were not nearly as severe as the defendant contends, they do indicate a more restricted latitude than would normally be permitted in courts here in attempting to determine what bias or motivation might possibly have influenced the witness in testifying as he did. Those matters go to weight, however, and this court is well satisfied that the testimony, together with the expert opinion, proves not that defendant is the person in the photograph but that that evidence is at the least wholly consistent with the contention that GX-32 is the "person-albogen" of defendant, as more strongly evidenced by the signature and as most strongly evidenced by the thumbprint. The court is persuaded beyond any reasonable doubt that the defendant is Liudvikas Kairys, born in Svilionys on December 24, 1920, who later became a resident of Vilnius, a Lithuanian citizen and ultimately an Oberwachmann at Treblinka labor camp.

The parties have argued at length the relative indicia of authenticity of defendant's identification card. If the government's evidence was not so conclusive, consideration of that argument would be of considerable significance. The evidence indicates that the identification document is not of recent origin and that it cannot be demonstrated either that such a document was not something which could have been issued in Lithuania in the early days of the war or that it was a document which was prepared shortly after the war.

Defendant dismisses the government's evidence that the forgery of identity documents was common among displaced persons attempting to immigrate. However, it is well known that such forgery was endemic. As *America and the Survivors of the Holocaust* (New York: Columbia University, 1982), by Leonard Dinnerstein, a recent study of the post-war immigration, states:

> As a result, document factories sprang up to provide whatever forms and authorizations a DP needed to produce. Many Balts and Ukrainians, for example, came to Germany with official government stamps and stationery. The American Army traveled with huge supplies of paper, ink, machines, etc., and black marketeers somehow found access to these materials. Sometimes, with or without these items, individuals used local craftsmen skilled in various types of forgeries. Some voluntary agency personnel also engaged in these illegal practices to speed the departure of DPs out of the assembly centers. Several thousand people had survived the war living by their wits, and the use of false papers did not strike them as improper. Most DPs regarded their own case as worthy, and if it simply meant changing a name, date, or place of birth or arrival to be accepted in the United States, they saw no harm in doing so (pp. 195-196).[1]

Indeed, defendant testified that a birth certificate he had carried since 1938 was used by him for cigarette paper during the Dresden service, a highly implausible story and one which,

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[1] That is not to say that defendant acquired his identification document with immigration to the United States in mind. That document was in existence in 1947, when he was accepted for labor service, prior to passage of the Displaced Persons Act. He obviously felt he needed, after the war, identification other than that furnished by the Germans. It is more plausible to believe that the changes in first name, dates and places, stemmed from a fear that he might be repatriated to the Soviet Union, where it would be ascertained that he had served the Germans. Once defendant had somewhat changed his identity he was stuck with it.

as a variation of "I lost my papers in the firebombing at Dresden," was a story which was then used as an example by the authorities of explanations which should be looked upon with suspicion.[2]

That defendant was a guard at Treblinka and that he has consistently not told the truth about his place and date of birth or his whereabouts during the war does not, however, end the inquiry. We turn, again, to a consideration of what the government must establish.

This is not a "war crimes" case of the kind that occupied the time and attention of various tribunals shortly after World War II and thereafter. *See e.g.,* Cowels, "Trials of War Criminals (Non-Nuremberg)," 42 American Journal of International Law 299 (1948); Koessler, "American War Crimes Trials in Europe," 39 The Georgetown Law Journal 18 (1950). Nor did the government rely heaviily upon defendant being guilty of moral turpitude because of wartime atrocities and therefore never eligible for American citizenship. While there is testimony of one fellow guard that he recalls seeing the Kairys he knew, from a considerable distance, participating in an atrocity, and defendant's presence amd possible involvement in another incident and in the final massacre is unclear, the simple fact is that there is a lack of sufficient credible evidence of defendant's personal involvement in any specific atrocity.

None of the survivors recalls any specific conduct by Kairys, if they recall him at all. Defendant argues that hyperamnesia, the indelible imprint of a prior traumatic experience, would cause survivors to recall Kairys if he was there. He virtually concedes, however, that some Kairys was a guard at the camp. The only reasonable conclusion is that defendant,

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[2] There is a certain irony in defendant's relationship to the Holocaust, which has come to mean the Nazi genocidal campaign against the Jews, and his later involvement in another man-made holocaust, more in keeping with traditional definitions. And so it goes.

never considered as a Barbie, an Artukovic, or a Trifa, provocateurs and organizers of wartime atrocities, was not a Swidersky either. Swidersky, another guard at Treblinka, was convicted of war crimes before a West German tribunal in 1968. The witnesses at that trial, including survivors, vividly recalled Swidersky's singular acts of brutality and sadism. Such testimony was absent here. We are left, then, with charges of illegal procurement, wilful misrepresentation or concealment and related moral turpitude charges, all arising from the 1949 entry into the United States and the subsequent naturalization in 1957. It also means that we are left with a case which does not differ in many respects from, for example, a charge that a citizen wilfully concealed his occupation as a bootlegger when he petitioned for citizenship. *See Costello v. United States,* 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961).

Maintaining a separation between the charges of illegal procurement and wilful misrepresentation and concealment on the one hand and, on the other, the context in which they arose, is not easy. That context does, indeed, create the "hydraulic pressure" Justice Stevens referred to in his dissent in *Fedorenko v. United States,* 449 U.S. 490, 538, 101 S.Ct. 737, 763, 66 L.Ed.2d 686 (1981). That context obviously dictated the immense effort the government has devoted to this case. That context finds expression in the legal literature, *e.g.,* the title of Breuer, "Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?", 40 Md.L.Rev. 39 (1981). That "hydraulic pressure" is, however, hardly surprising. For those who are old enough to recall the Allied armies storming across Poland and Germany, the movie newsreels and the newspaper and magazine photographs, progressively revealing the enormity of the horror of what had happened in central Europe during the war years, remain as graphically in memory as when first seen.

Defendant argues that those events are too long ago—that the government's claims are barred by *laches* and that appli-

cation of illegal procurement of citizenship provisions, even if statutorily mandated, would violate the *Ex Post Facto* clause of the United States Constitution. The short, and overly simplistic, answers are that the government cannot be barred by *laches* in a denaturalization proceeding,[3] *Costello v. United States, supra,* 365 U.S. at 281, 81 S.Ct. at 542, and that denaturalization is a civil, rather than criminal, proceeding, *Johannessen v. United States,* 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066 (1912); *United States v. Schellong,* 717 F.2d 329, 336 (7th Cir.1983), *cert. denied,* —— U.S. ——-, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984).

I say "overly simplistic," however, because *Johannessen's* analogy by a unanimous Court to land grants and patents came toward the close of the last great wave of virtually unrestricted immigration. A few years later, in the aftermath of the First World War, the plight of masses of rootless, stateless people in Europe drove home the nexus between citizenship and meaningful rights, *see* Arendt, *The Origins of Totalitarianism* (1951), pp. 265-298, and denationalization "became a powerful weapon of totalitarian politics. . . ." *Id.* at 268.[4] The

[3] It can also hardly be said that the government slept on its rights. The government was unaware that a Treblinka guard by the name of Liudas Kairys lived in the United States until the Soviet Union, stung by criticism of its lack of compliance with the Helsinki accords, provided that information from the archives created from captured German documents and other sources.

[4] It is interesting to note the author's reference, at p. 276, to a French official's description of Vilnius as *"la capitale des apatrides"* because of its transfer back and forth among neighboring nation states in the aftermath of World War I. *Id.* at 276. That cycle resumed during World War II. Defendant, before he was 22, was a Polish national, a Lithuanian national, a Lithuanian soldier, a Soviet national, a Soviet soldier and a person of Baltic extraction recruited by the Germans for paramilitary duties. His statuses as a Soviet national and

(Footnote continued on following page.)

Supreme Court in *Schneiderman v. United States*, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796 (1943), did not abandon the concept of denaturalization as a civil proceeding and it invoked the land grant revocation analogy as justification for a higher burden of proof. It also, however, explicitly recognized the priceless status of citizenship (at p. 122, 63 S.Ct. at p. 1335):

> This is not a naturalization proceeding in which the Government is being asked to confer the privilege of citizenship upon an applicant. Instead the Government seeks to turn the clock back twelve years after full citizenship was conferred upon petitioner by a judicial decree, and to deprive him of the priceless benefits that derive from that status. In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many it is

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soldier were involuntary. We do not know the nature of defendant's recruitment by the Germans because he denies it. We do know that the mortality rate of Soviet prisoners in German P.O.W. camps was appalling. Of over five million Soviet prisoners of war taken by the Germans, about three and one-half million died from massacre, starvation, and exposure. *See* I. Grey, *Stalin, Man of History*, 370 (1979); B. Dmytryshyn, *US.S.R., A Concise History*, 223-24 (1971). There was also some, perhaps self-serving, testimony of coercion in the recruitment at Hammerstein. One witness testified that a Hammerstein prisoner who refused to "volunteer" was shot. There is, apparently, no question that a person once recruited could not leave German service. It is also interesting to note that Soviet nationals who served at Treblinka and who thereafter were captured by the advancing Soviet armies were later imprisoned for a number of years and then released. In that respect they appear to have been treated much the same as Soviet P.O.W. survivors who went from German camps to Soviet camps, guilty only of being captured alive. *See* I. Grey, *Stalin, Man of History*, 371 (1979); R. Hingley, *Joseph Stalin: Man and Legend*, 371-72 (1974).

> regarded as the highest hope of civilized men. This does not mean that once granted to an alien, citizenship cannot be revoked or cancelled on legal grounds under appropriate proof. But such a right once conferred should not be taken away without the clearest sort of justification and proof.

In 1958 similar views were even more eloquently expressed by Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) at p. 101, 78 S.Ct. at p. 598:

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless.

And see Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160-161, 83 S.Ct. 554, 563-564, 9 L.Ed.2d 644 (1963).

The year prior to defendant's entry into the United States, Congress had passed the Displaced Persons Act of 1948, Pub.L. No. 80-774, 62 Stat. 1009. That Act relaxed immigration quotas from 1948 to 1952 to permit the immigration of over 400,000 "displaced persons." A displaced person was defined as one "defined in Annex I of the Constitution of the International Refugee Organization and who is the concern of the International Refugee Organization." Annex I of the Constitution of the International Refugee Organization (I.R.O.) excluded from its "concern" those who had "assisted the enemy in persecuting civil populations of countries, Members of the United Nations" or "voluntarily assisted the enemy forces since

the outbreak of the Second World War in their operations against the United Nations." The first exclusion generally applied to "war criminals," whose names were generally, but by no means always, listed by the United Nations War Crimes Commission. The emphasis in the second was upon "voluntarily," involving free will, and Balts who were conscripted were not to be classified as having voluntarily served. Enlistment was not automatically disqualifying; the applicant could seek to prove that the enlistment was coerced. In any event, the ultimate burden of proof was upon the applicant to demonstrate that he was the "concern" of the I.R.O.

The administrative procedures established to screen displaced persons applicants are described in *Fedorenko v. United States*, 449 U.S. 490, 101 S.Ct. 737, 66 L.Ed.2d 686 (1981). The I.R.O. initially determined whether the applicant was their "concern." United States officials in the field thereafter determined whether the applicant was qualified under the Displaced Persons Act, which included within it most of the requirements of the then immigration statutes. It is beyond dispute that an armed guard at a camp such as the Treblinka labor camp was not eligible for a visa as a displaced person. The Supreme Court expressly so held in *Fedorenko v. United States, supra.*[5]

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[5] In *Fedorenko* the Court held that Congress intended the exclusion to extend to anyone who assisted, in any substantial manner, in the persecution of civil populations, whether or not that assistance was voluntary or coerced and that service as an armed concentration camp guard was such assistance. And certainly Congress could so restrict eligibility. The displaced persons programs of several countries, arising both from humanitarian reasons and the international ramifications of millions of people left by the Nazi war and the subsequent political realignments rootless and statelesses in a prostrate Europe, sought the resettlement of some but not all of those people. Among the equally deserving not all could emigrate. It is not surprising, therefore, that some would be preferred over others, and that people would be classified through a process

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The government contends that such a determination should end the matter: defendant was ineligible for a visa, he was therefore not lawfully admitted pursuant to a valid visa, and, accordingly, his subsequent naturalization was "illegally procured" and revocable pursuant to 8 U.S.C. § 1451(a).

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involving a rather loose sieve. For example, Congress expressly excluded those who voluntarily served in German military formations, even though a German who voluntarily served in such units as the Waffen SS was eligible to be a quota immigrant unless he was implicated in war crimes. Because of the wholesale dispersion of populations and the destruction or unavailability of official records, the classification process was necessarily dependent to a large extent upon the unverifiable representations of applicants and whatever authentic appearing documents they produced (an incentive certainly for the forgery of documents described, Dinnerstein, *supra*).

As is apparent from the I.R.O. Manual for Eligibility Officers, field personnel made pragmatic credibility judgments, with adherence to a particular group or participation in a particular unit being judged in light of information about that group or unit's recruitment, activities and apparent adherence to Nazi doctrines. It is not at all clear that, to the I.R.O., a camp guard was conclusively not its "concern" if he could show he was conscripted and did not participate in any atrocities, and it is the I.R.O. definition Congress adopted. Contrary to the testimony in *Fedorenko*, there is as well a considerable question whether guard service was voluntary, since there is some question whether or not the original recruitment was voluntary. It does not appear that the nature of the services to be performed were defined, and the assignment to guard service was by military order. Further, a government witness in this case indicated that the exclusion was not necessarily automatic. Even if *Fedorenko* had not concluded the matter, however, those uncertainties would not have helped defendant. It is clear that defendant here would not have been a "concern" and, therefore, eligible for a visa if his wartime service had been disclosed and he had thereafter been unable to demonstrate that his service was coerced and that he did not participate in atrocities. That demonstration he has not been prepared to make, since he has denied the service.

Before turning to that contention, however, we will discuss the other grounds advanced by the government for revocation. Those are that Kairys concealed material facts or made wilful misrepresentations on his visa application by concealing his wartime service and by using a false name, false birth date and false place of birth; that he did the same on his naturalization papers and further concealed his participation in atrocities and his falsehoods on his visa application; that he misrepresented his wartime occupation; and that he then lacked good moral character because of his participation in atrocities and his wilful misrepresentations.

The primary thrust by the government is concealment of wartime service because that service, if known, would have excluded Kairys as a matter of law. It is here that the government's case first falters. Plaintiff concedes that the representations of defendant to the I.R.O., whatever they might have been, could not now be a basis for revocation. It rests, initially, upon the visa application signed by Kairys which recites that during the period 1938-1944 he resided in Radviliskis and other places in Lithuania. If defendant resided where he served, that information is incomplete and, therefore, untrue. During that period he was physically present for extended periods in Trawniki and Treblinka camps, both in Poland. It is, moreover, unclear whether he ever resided in Radviliskas, and he certainly did not do so for the extended periods claimed. Even defendant concedes that.

The application does not, however, specifically inquire about wartime service. While Kairys undoubtedly had no interest in disclosing that service, the question is whether or not he clearly and unequivocally was asked to disclose it, and the answer is that he was not. It matters little that defendant may have perceived the inquiry as being directed to those places he considered "home," despite a temporary absence due to wartime service (a wholly unlikely perception by defendant although not at all unlikely for, say, a former United States

serviceman who was drafted from "home" and thereafter served in a number of places in the United States and overseas), or that he believed he could so interpret the inquiry. The simple fact is that he was not specifically directed to disclose. It was not until 1950, after defendant had entered the country, that sec. 13 of the DPA was amended to require an explicit oath denying the kind of service in which defendant was engaged. Pub.L. No. 555, 64 Stat. 227.

Defendant goes further. He seeks to avoid responsibility for the visa application he signed, on the ground that it has not been conclusively determined that he fully understood the information sought. The procedures, however, provided for a careful translation of the form before it was filled in and executed, and Kairys had to know that preparation of the visa application was of significance. The presumption of official regularity, *see United States v. Chemical Foundation,* 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926); *Borg-Warner Corp. v. Commissioner,* 660 F.2d 324, 330 (7th Cir.1981), defeats that argument, but it does not save the government's additional contention: that defendant was undoubtedly asked about his wartime service because that was a routine inquiry. The evidence was not so conclusive. There was no introduction of any written policy to that effect. At most the testimony indicated that it was a common inquiry, although in the mass processing then going on it is also quite likely that the inquiries were perfunctory and confined to the application.

The application to file a petition for naturalization is even more ambiguous. When asked what organizations, clubs or societies in the United States "or in any other country" of which he had been a member both during the last ten years and before the last ten years, defendant responded "none." The government contends that he should have listed his wartime service. That contention was persuasive in *United States v. Schellong,* 717 F.2d 329 (7th Cir.1983), *cert. denied,* —— U.S. ——, 104 S.Ct. 1002, 79 L.Ed.2d 234 (1984), but there the

defendant clearly understood the inquiries to include military and paramilitary service, as he listed some service but omitted other service and specifically disclaimed service in a concentration camp, "by far the most damning." *Id.* at 334. Here, by the government's argument, any service in the United States military should have been listed in the responses to questions 8 and 9, even though that specific inquiry was made in question 16, where Kairys did list his labor service. Again, a later application form, and the form now in use, specifically asks about service in military and paramilitary units during the war and in labor camps, but that was not the form used when Kairys applied for citizenship.

The government seeks to rely, also, upon the change in spelling of the first name, the false birth date, the false place of birth and false residences. This court is wholly persuaded that the false information was wilfully represented by defendant. It is, however, not material as that term has come to be defined. The Supreme Court in *Fedorenko v. United States, supra,* expressly declined to determine whether the standards previously enunciated in *Chaunt v. United States,* 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960), applied to DPA visa applications, but the lower courts have consistently assumed or held that they do. The meaning of those standards remains unclear; the circuits are divided, *see United States v. Kowalchuk,* 744 F.2d 301 (3rd Cir.1984), *rehearing en banc granted,* opinion withdrawn from publication, and the Seventh Circuit has yet to rule.[6] Even read broadly, however, the *Chaunt* second prong requires a possibility that the disclosure of the true facts would

[6] One does wonder how denaturalization based upon the possibility that the disclosure of nondisqualifying facts years earlier could conceivably have led to the discovery of disqualifying facts squares with the Supreme Court's express recognition in *Schneiderman v. United States, supra,* that denaturalization, in which the government "seeks to turn the clock back," is significantly different from the original naturalization.

have led to the discovery of disqualifying facts. Here the nexus between a Kairys born December 24, 1924 in Svilionys and a Kairys at Treblinka was, both in 1949 and 1957, unknown, and given that the information respecting such a nexus was solely in Soviet archives probably unknowable. Kairys could have, with impunity, listed his proper first name, place of birth and birth date, and a Svilionys residence, and the visa and certificate of naturalization would have issued. *See United States v. Rossi*, 299 F.2d 650 (9th Cir.1962). Nor does defendant's listing of "farmer" add much to the government's case. He was raised on a farm, he worked on a farm immediately after the war, and he claims that he studied farming when he was associated with the U.S. Army. In any event, it was probably as close to a civilian occupation as Kairys had ever had when he so claimed it as his own.

The case, then, comes down to whether defendant's certificate of naturalization is revocable because it was "illegally procured." That raises two issues: (1) is naturalization illegally procured if it is based upon admission to this country upon a visa for which the petitioner was ineligible, and (2) is "illegally procured" a ground for revocation now even though it was not a ground in the statute at the time of defendant's naturalization. We deal with the second issue first.

Defendant contends that illegal procurement cannot serve as a basis for revocation because it was not included in the statute at the time of defendant's naturalization and a congressional intention of retrospective application has not been clearly manifested. In 1957, when Kairys was naturalized, 8 U.S.C. § 1451(a) did not list illegal procurement as a basis for revocation. In 1961 Congress, noting that the Fifth Circuit in *United States v. Stromberg*, 227 F.2d 903 (5th Cir.1955), did not find illegal procurement preserved from the 1940 Act as a basis for revocation, added that language to the statute. *See* H.R.Rep. 1086, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code, Cong. & Ad.News 2950, 2982. Defendant concedes

that retrospective application of an amendment is generally without legal infirmity if Congress so intended, *see generally, Union Pacific R.R. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199, 34 S.Ct. 101, 102, 58 L.Ed. 179 (1913); *South East Chicago Commission v. Dept. of Housing & Urban Development*, 488 F.2d 1119, 1122 (7th Cir.1973), but argues that no such intent was manifested here.

Retrospective application of an amendment is generally not implied. No such application, however, is sought here. Sec. 1451 is a denaturalization statute, regulating denaturalization proceedings. It is a remedial provision. This denaturalization action was brought in 1980, well after enactment of the amendment. The granting of citizenship—the substantive right sought to be protected by defendant—is governed by other sections, including 8 U.S.C. § 1181, which were in effect in 1957. Sec. 1181 requires a valid immigrant visa for legal admission to this country, a requirement defendant did not fulfill.

Sec. 1451(i) evidences clear congressional intent that this action be governed by sec. 1451(a) as it currently exists. Sec. 1451(i), promulgated in 1952, states that the provisions of sec. 1451 apply to all certificates of naturalization, whenever granted, without regard to what revocation standards were in effect at the time of naturalization. The 1961 amendment, then, was of a section which already provided for retrospective application. It must be assumed that Congress was aware of sec. 1451(i) when it enacted the 1961 amendment and was aware of the clear statutory language to that effect.

Indeed, it is difficult to conceive why Congress, in view of the purpose of the amendment, would have it apply to citizenships illegally procured after enactment but not before. A similar intent has been followed by the Supreme Court in constructing predecessor statutes. *See e.g., Luria v. United States*, 231 U.S. 9 at 24, 34 S.Ct. 10, 13, 58 L.Ed. 101 (1913);

Johannessen v. United States, 225 U.S. at 240-43, 32 S.Ct. at 616-17. An act which is amended "should be construed as to future events as if it had originally been enacted in that form." 1A, C. Sands, *Sutherland on Statutory Construction*, § 22.35 at 197 (4th ed. 1972) (treatise cited approvingly by both parties). Sec. 1451, if enacted in its present form in 1961, would allow application of the illegal procurement standard to this action. The illegal procurement standard does properly apply to defendant's denaturalization proceeding. *See generally United States v. Koziy, supra* (applying illegal procurement standard in denaturalization proceeding where citizenship was acquired in 1956).

Revocation premised upon illegal procurement was, from time to time, granted without regard to any mental state of the defendant. *See United States v. Ginsberg*, 243 U.S. 472, 37 S.Ct. 422, 61 L.Ed. 853 (1917); *United States v. Ness*, 245 U.S. 319, 38 S.Ct. 118, 62 L.Ed. 321 (1917); *United States v. Beda*, 118 F.2d 458 (2d Cir.1941). The obvious inequities of a mechanical application of such an interpretation led courts to ameliorate or ignore it in numerous cases, *e.g., United States v. Anastasio*, 226 F.2d 912 (3d Cir.1955); *United States v. Bialoglowski*, 21 F.Supp. 613 (S.D.Calif. 1937), *aff'd* 101 F.2d 928 (9th Cir.1939). The result was that, in 1952, when "illegally procured" was removed from the statute as a basis for revocation and in 1961, when it was returned to the statute, the case authority was in hopeless confusion, as is well documented in *United States v. Kusche*, 56 F.Supp. 201 (S.D.Calif.1944).

The legislative history of the 1961 amendment, however, crystallizes Congress' intent in returning the words "illegal procurement" to the statute. The sponsors of the amendment intended to combat fraud in naturalization proceedings. *See* 107 Cong.Rec. 18,284 (1961) (remarks of Rep. Walter); 107 Cong.Rec. 19,651 (1961) (remarks of Sen. Eastland). They were concerned with the same proof problems that have arisen here. *See* H.R.Rep. 1086, 87th Cong., 3d Sess., 39, *reprinted in*

1961 U.S.Code, Cong. & Ad.News, 2950, 2983. The House report, in advocating the adding of the amendment, made it clear what it intended the addition to accomplish. "The congressional mandate that no person shall be naturalized unless possessed of certain qualifications is ineffectual unless there is also statutory provision for revoking citizenship where the prerequisites did not in fact exist. In the majority of such cases it is difficult if not impossible to prove there was concealment of material facts or wilful misrepresentation." *Id.* To that end, Congress added the "illegal procurement" basis for revocation to remove the intent requirement and to allow denaturalization for any failure of a condition precedent to the naturalization.

> Naturalization is illegally procured if some statutory requirement is absent at the time the petition was granted. In other words, naturalization has been illegally procured if jurisdictional factors are not present at the time citizenship is granted. (*United States v. Ginsberg,* 37 Sup.Ct. 422, 243 U.S. 472, 61 L.ed. 853.)

Id. See United States v. Koziy, 728 F.2d 1314, 1318 (11th Cir.), *cert. denied,* —— U.S. ——, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984).[7]

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[7] This is apparently the definition adopted by the Court in *Fedorenko.* The Court cited with approval the strict illegal procurement definition of *United States v. Ginsberg* and *United States v. Ness. Fedorenko v. United States,* 449 U.S. at 506-07, 101 S.Ct. at 747-48. *See also id.* at 515, 101 S.Ct. at 751. In *Fedorenko,* a material misrepresentation was found and, though analyzed through the illegal procurement language, this misrepresentation constituted fraudulent procurement, which has not been sufficiently proven here. Justice Stevens, in his dissent in *Fedorenko,* however, characterized the Court's decision in a manner totally consistent with the amendment's legislative history. "Because the Court holds as a matter of law that petitioner's service as a guard at Treblinka, whether or not voluntary, made him ineligible for a visa, petitioner was not legally admitted to the country and hence was not entitled to citizenship." *Id.* at 533, 101 S.Ct. at 761.

That doctrine was sanctioned by *United States v. Ginsberg, supra,* and it has been given renewed vigor by *Fedorenko.* The absence of defined constitutional restrictions, other than an enhanced burden of proof, leaves citizenship by naturalization vulnerable to revocation many years later, regardless of culpability. For example, a physical examination years later may determine that an immigrant had, unknown to him, tuberculosis when he entered this country and therefore was ineligible for a visa. Continued citizenship may, in those circumstances, depend solely upon an executive decision not to seek revocation. That doctrine, coupled with the inapplicability of *laches,* leaves the naturalized citizen always at risk. Small wonder it is, then, that courts have struggled against the rigors of its application.

This court is troubled by the implications of a power, largely unchecked by constitutional restraints, to revoke citizenship based upon some decades-old error, however clearly demonstrated. "Citizenship *is* man's basic right for it is nothing less than the right to have rights." *Perez v. Brownell,* 356 U.S. 44, 64, 78 S.Ct. 568, 579, 2 L.Ed.2d 603 (1958) (Warren, C.J., dissenting). Revocation becomes dependent upon highly selective executive discretion, which in turn is influenced by subsequently arising policy priorities—involvement in organized crime, pan-Germanism during World War II, Communist affiliation or, as here, a response to belated disclosures and criticisms by the Soviet Union.

The implications of virtually unrestrained congressional and executive power over the continuing status of citizenship has led to a number of decisions by a sharply divided Court respecting denationalization by expatriation. During the post-war period many lower courts adopted an elastic concept of duress to ameliorate the rigors of expatriation provisions. *See e.g., Stipa v. Dulles,* 233 F.2d 551 (3d Cir.1956); *Soccodato v. Dulles,* 226 F.2d 243 (D.C.Cir.1955); *Mendelsohn v. Dulles,* 207 F.2d 37 (D.C.Cir. 1953); *Takehara v. Dulles,* 205 F.2d 560

(9th Cir.1953). Expatriation law was, at that time, as confused as denaturalization for illegal procurement (see p. 1269, *supra*). The Supreme Court thereafter recognized congressional authority to provide for expatriating acts even in the absence of a specific intent to surrender citizenship, if there were foreign relations implications, *Perez v. Brownell*, 356 U.S. 44, 78 S.Ct. 568, 2 L.Ed.2d 603 (1958). That authority did not, however, extend to expatriation as a penal sanction, *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), and the Court adopted both a stringent burden of proof and an expansive scope of review, *Nishikawa v. Dulles*, 356 U.S. 129, 78 S.Ct. 612, 2 L.Ed.2d 659 (1958). That expatriation could not be employed as a penal sanction was again determined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

Four years later the Supreme Court, in *Afroyim v. Rusk*, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed.2d 757 (1967), overruled *Perez v. Brownell, supra.* In a 5-4 decision it held that expatriation required not only voluntary conduct but also an informed and voluntary renunciation of citizenship. The Court adhered to that view in *Vance v. Terrazas*, 444 U.S. 252, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980), but it also concluded that Congress could adopt proof standards less stringent than those imposed in *Schneiderman v. United States, supra,* and *Nishikawa v. Dulles, supra*, specifically holding that those decisions were not rooted in the Constitution.

In *Afroyim v. Rusk, supra*, the Court noted a distinction between expatriation and denaturalization. *Id.* 387 U.S. at p. 267, fn. 23, 87 S.Ct. at p. 1667, fn. 23. ("Of course, . . . naturalization unlawfully procured can be set aside.") The Court introduced a further qualification in *Rogers v. Bellei*, 401 U.S. 815, 91 S.Ct. 1060, 28 L.Ed.2d 499 (1971), where it recognized a distinction between Fourteenth Amendment citizenship, whether by birth or naturalization, and citizenship acquired solely by statutory enactment (there, birth abroad to a

couple of whom one was a United States citizen and one was an alien). The Court relied, in part, at p. 830, 91 S.Ct. at p. 1068, upon *United States v. Ginsberg, supra,* and *United States v. Ness, supra,* just as it later did in *Fedorenko v. United States, supra.*

The doctrine of illegal procurement, particularly in light of the holding in *Vance v. Terrazas, supra,* that a stringent burden of proof in denaturalization cases is subject to statutory change, imparts an extraordinary fragility to citizenship acquired by naturalization. It is difficult for this court to rationalize the present law of denaturalization with *Schneider v. Rusk,* 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964), where the Court started "from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive," absent material fraud in procurement and with the concept in *Afroyim v. Rusk, supra,* that loss of citizenship by expatriation requires a voluntary and informed choice. *Id.* 377 U.S. at pp. 165-166, 84 S.Ct. at pp. 1188-1189. The Supreme Court has, however, accorded illegal procurement a continuing vitality, and this court is bound to follow.[8]

Pursuant to that doctrine, Kairys is properly subject to denaturalization. As stated previously, an armed guard at the Treblinka labor camp was not eligible for a visa under the Displaced Persons Act. *See Fedorenko v. United States, supra.*

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[8] The expatriation cases mandate a voluntary renunciation, an intentional relinquishment. Citizenship by naturalization is accorded in the Fourteenth Amendment a status equal to citizenship by birth in this country. Once citizenship has attached through official naturalization proceedings, with all the expectations that inevitably and justifiably flow from those proceedings, one wonders how that citizenship can be revoked in the absence of some intentional conduct chargeable to the citizen which taints that proceeding, customarily fraudulent concealment of material facts. That has not, however, been the direction of the Supreme Court cases respecting denaturalization and, accordingly, it is not a direction this court can pursue.

This is so with or without a material misrepresentation. Kairys, therefore, was not statutorily eligible for the visa he procured pursuant to the Act. Because he did not fulfill all of the statutory requirements for his naturalization, his citizenship was illegally procured. *See United States v. Koziy*, 728 F.2d at 1318-19; *United States v. Kowalchuk*, 571 F.Supp. 72 (E.D.Pa. 1983), *rev'd on other grounds* 744 F.2d 301 (3d Cir.1984), *en banc hearing granted; United States v. Dercacz*, 530 F.Supp. 1348, 1351-52 (E.D.N.Y.1982). Accordingly, defendant's certificate of naturalization must be revoked.

APPENDIX D

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,

v. } No. 80 C 4302

LIUDAS KAIRYS,
Defendant.

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable JAMES B. MORAN, one of the Judges of said Court, in his chambers in the United States Courthouse, Chicago, Illinois, on Wednesday, May 26, 1982, at the hour of 10:10 a.m.

APPEARANCES:

MR. ALLAN A. RYAN, JR.

MR. NORMAN A. MOSCOWITZ

MR. MICHAEL WOLF

MS. LINDA A. WAWZENSKI

appeared on behalf of Plaintiff;

MR. DAVID E. SPRINGER

MR. THOMAS O. KUHNS

appeared on behalf of Defendant.

K. JOSEPH SNYDER, RPR, CSR

Official Reporter

Telephone: (312) 939-2059

* * *

MR. SPRINGER: Okay. The first one is our motion for certification of the jury trial issue to the Court of Appeals.

THE COURT: Right, and that will be denied. I think at this point, rather than, given the dynamics of this thing, for me to sit down and spend a fair amount of time writing up my reasons, I think the best thing to do is just to explain on the record what they are.

In light of *Johannessen* and *Luria* and *Fedorenko* and *Walus*, I think whether I agree or disagree that I am bound by the present posture of the courts on this question. At the same time, I think that is a somewhat simplistic response, and let me give you my views on the basis of my reading of the cases, and I think possibly a kind of historical look at it would be appropriate.

I certainly recognize that when that question was first brought up, that we were in an entirely different climate where naturalization was an entirely different procedure, where the borders were a lot more open legally than they are now, where large numbers of people were becoming naturalized as a matter of course and flowing into the country.

Since then the courts have certainly become much more sensitive to the vastly important interests that are at stake in denaturalization, and I must say this may be apropos of the equal protection area, and respecting expatriation.

Most of the deportation cases or the denaturalization cases have arisen in the context of, or at least some of them, the major ones, have arisen in the context of cases such as these, the expatriation cases were much more front and center in fact in the late fifties.

But the interests implicated in both sets of cases are not too dissimilar.

Having ruled early that these were in denaturalization cases essentially equitable civil actions, the courts I believe have felt somewhat uncomfortable in treating them as run of the mine equitable actions because they aren't, because of the very very significant interests involved in the loss of citizenship.

We certainly saw that in *Schneiderman* with the enhanced burden of proof. We certainly saw that in the series of expatriation cases arising out of usually dual nationality problems, and I think there what happened is somewhat instructive where we went from historical concept of voluntary surrender of nationality by conduct, the old I can only say pre-ERA concepts of the wife cleaves the husband and loses her nationality by marrying someone of foreign nationality.

But certainly in those cases there was never any question that it was not a criminal action. The real question was what constitutes a surrender of nationality.

We then moved into statutory expatriation in the 19th century, and then under the McCarran Act, as I recall, an administrative procedure to enforce expatriation, and there the fight was over whether administrative proceedings were sufficient due process, not whether it was a criminal sanction, and not whether there was a right to a jury trial.

As I recall, in the immediate postwar period, we ended up with a large flock of cases, a lot of them arising out of the Italian election in 1948 when DeGasperi was the white knight and also dual nationals voted in that election and then there is a question of whether they were any longer a United States citizen where you ended up with some very creative judicial opinions which, one, made it a judicial rather than administrative decision, and, two, stretched concepts of coercion and duress beyond belief, which I had always thought was really a judicial response to the seriousness of the result of just a straight, this is a congressional command and if you did it, you are no longer a citizen. The seriousness of that results in

judicial discomfort with that result in those kinds of circumstances.

But we really have, it seems to me, over the years ended up with a considerable judicial ambivalence regarding these questions and which is probably well exemplified by *Perez* and *Trop* companion cases where, anything else, where in one have you the emphasis on congressional power over foreign relations, and the next, *Trop,* because it didn't involve foreign relations, but essentially a sanction for an internal criminal act, namely desertion.

The Court was, at least one justice was more willing to recognize that it was a criminal sanction, which switched the majority, and the attitude expressed in those two opinions are very disparate.

But even there, there was a fairly clear distinction between congressional control over foreign policy and, therefore, its constitutional reach, and the sanctions type of expatriating act which the Court did not consider to be within congressional reach, at least not without an entirely different procedure than the one that was mandated.

But even there, as far as I read the cases, there it was a constitutional question of congressional power, but when we have gotten to this area of what are these cases, there never has been any real question that in those instances where the power being asserted is one that the courts recognize congress has the authority to assert, that it is not a criminal case. It is a case to be resolved through "civil" procedures and does not involve a jury.

And at the same time, going back to *Schneiderman,* there has been a recognition that isn't a run of the mine civil case, that the courts have incorporated various extra safeguards such as enhanced burden of proof without necessarily resting it on a constitutional due process foundation, but on other bases, and I

must say that in my own view, that there is, because of the liberty and the property interests involved, that it perhaps would have been better a long time ago if the Supreme Court had taken the bull by the horns and said there are constitutional due process foundations to all this and it isn't a regular civil case. They haven't done that in any terribly explicit fashion, but certainly it is lurking there implicitly.

I look upon *Kennedy versus Mendoza Martinez* as essentially a progeny of *Trop versus Dulles.* There there were slightly involved foreign relations interests, problems of dual nationality, but it certainly was much more akin to the you didn't do something we have told you to do, you had an obligation to do as a citizen and, therefore, you are out, and that, the Court had said in *Trop,* "You can't do," and they said in *Kennedy,* "You can't do."

Where that leaves us, it seems to me, given a background in which there never has been juries in these cases, is a question of whether in fashioning judicial enforcement of a congressional command is whether or not it is implicitly or constitutionally mandated, but whether a jury is an imperative of due process, and on that one I don't think that it is an imperative. I think the experience in this case again demonstrates that it is not an ordinary civil case.

Indeed, if the defendant, as he has argued in one part of his motion, were to have this as a criminal prosecution, it would have been in certain ways seriously disabling to the defense because the access to the civil rules of civil procedure and discovery, in which I have certainly been very liberal to the defendant, has been in this case, and I would expect normally in this kind of case, of considerable significance since without question the resources of the Government to obtain information on matters in a foreign country many many years ago is far greater than the individual who is being named as defendant. And I recognize that and somewhat to the Government's

displeasure, I have used that as a premise in ruling on discovery matters.

By the same token, counsel for the defendant were appointed and they accepted that appointment and they have been certainly vigorously defending ever since, which is not the normal pattern in a civil action.

But all that leads me to conclude that given the prior precedent and given what seems to me to be the real issue in the jury demand, and that is given the nature of the case is a jury trial constitutionally mandated or otherwise required as an imperative of due process or of equal protection, and the answer to that is no. So that is why I denied the jury motion.

MR. SPRINGER: Your Honor, we are not going to reargue the jury motion before you.

I would like to point out, just to make my record on the 1292(b) motion, that as the briefing has made clear, the right to a jury trial and the controlling aspects of the *Luria* and *Walus* case are subjects of debate.

As we know, the *Luria* analogy of a citizenship to a patent just can't hold up anymore, and the kind of citizenship that was involved in *Luria* was a lot different than the kind that is involved here.

THE COURT: And that I concede to you, that just simply saying, "Well, it's like a patent," just isn't so.

But jumping from there to saying that it is a criminal action or that there is a, given the nature of the proceeding, it is imperative that there be a jury as a matter of due process is where we part company.

* * *

(N.B. Spelling errors in the transcript have been corrected).

APPENDIX E

APPENDIX E

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

UNITED STATES CONSTITUTION

Article I, Section 8:

"The Congress shall have Power ... To establish an uniform Rule of Naturalization ...." (cl. 4).

Article I, Section 9:

"No ... ex post facto Law shall be passed." (cl. 3).

Article III, Section 2:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by jury ...." (cl. 3).

Amendment V:

"No Person shall ... be deprived of life, liberty, or property, without due process of law ...."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ...."

Amendment VII:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States ...."

STATUTORY PROVISIONS

Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260 (1952), as amended by Section 18(a) of Pub. L. 87-301, 75 Stat. 656 (1961), and, as amended, codified at 8 U.S.C. § 1451(a) (1982):

> "It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization *were illegally procured or* were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively . . . . "

(N.B. The italicized language was added by Section 18(a) of Pub. L. 87-301, 75 Stat. 656 (1961)).

Section 18(a) of Pub. L. 87-301, 75 Stat. 656 (1961):

> "Section 340(a) of the Immigration and Nationality Act (66 Stat. 260; 8 U.S.C. 1451(a)) is hereby amended by inserting, following the language 'that such order and certificate of naturalization' the language 'were illegally procured or'."

Section 340(i) of the Immigration and Nationality Act of 1952, 66 Stat. 262 (1952), 8 U.S.C. § 1451(i):

> "The provisions of this section shall apply not only to any naturalization granted and to certificates of natural-

ization and citizenship issued under the provisions of this subchapter, but to any naturalization heretofore granted by any court, and to all certificates of naturalization and citizenship which may have been issued heretofore by any court or by the Commissioner based upon naturalization granted by any court, or by a designated representative of the Commissioner under the provisions of section 702 of the Nationality Act of 1940, as amended, or by such designated representative under any other act."

RULES

Rule 901, Federal Rules of Evidence:

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(8) Ancient documents or data compilations. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

* * *

APPENDIX F

APPENDIX F

SUPPLEMENTARY LEGISLATIVE HISTORY

1. Immigration and Naturalization Service, Department of Justice, *Report on S. 3455 [81st Cong., 2d Sess.]: A Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality; And for Other Purposes*, pages 339-1, 339-2, and 339-9, *referenced in* S. Rep. No. 1137, 82d Cong., 2d Sess. 3 (1952) and H.R. Rep. No. 1365, 82d Cong., 2d Sess. 27-28 (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1678. This Report was quoted by the Government (Brief for the United States at 49, 58 n.5, 62 n.8) to support its position in *Shomberg v. United States*, 348 U.S. 540 (1955).

REVOCATION OF NATURALIZATION

Section 339.

This section is apparently designed to replace section 338 of the 1940 Act; many noteworthy additions and changes have been made.

Subsection(a)

This subsection declares that it shall be the duty of the United States district attorneys, upon the basis of an affidavit of good cause, to institute an action in certain specified courts for the purpose of canceling the citizenship of a naturalized person on the ground that the order of naturalization was "procured by concealment of a material fact or by willful misrepresentation". Section 338(a) of existing law states the grounds for a cancellation action to be "on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured".

It is observed from the new language contained in the bill that there has been removed, as a basis for cancellation of citizenship, the ground of illegality, as such, especially where the illegality relates to technical and procedural requirements for naturalization. It might be argued that in any case in which there has been a willful misrepresentation, there will follow

automatically a status of illegality. However, it must be observed that insofar as such matters as jurisdiction of the court, date of final hearing, execution of the petition for naturalization, attestation by the clerk, and the like are concerned, the Government is apparently left completely without any remedy for the revocation of citizenship. The Service offers no suggestion as to the enactment of this provision, believing it to be a matter of legislative policy.

It is observed that the ground "fraud" as a basis for cancellation of citizenship has been removed from the law. In lieu thereof the bill substitutes the language "concealment of a material fact or by willful misrepresentation". This change was apparently made because of the confusion which arises upon a comparison of numerous court decisions involving the revocation of citizenship. While the Service offers no recommendation upon the enactment of this section of the bill with the changed language, it is necessary to observe that section 339(a) of the bill does not require that the concealment of a material fact be made knowingly, or that it be known to the naturalised person that the fact was material. Thus, the element of *scienter* is removed. However, the quoted language leaves wide latitude for judicial interpretation and it is difficult to forecast the extent to which the courts will go in applying this language, particularly in view of the stringent rules laid down in the *Schneiderman* case (320 U.S. 116) as to the quantum of evidence necessary for the Government to succeed in a revocation of naturalization proceeding.

* * *

Subsection(i)

This subsection is designed to replace sections 338(g) and 704 of the 1940 Act. It provides that the provisions of this section shall apply not only to naturalizations granted under the provisions of this bill, but also to naturalization previously procured, including administrative naturalizations under section 702 of the 1940 Act.

2. Report of the Department of Justice dated June 21, 1961 on H.R. 192, 87th Cong., 1st Sess. (1961), *referenced in* H.R. Rep. No. 1086, 87th Cong., 1st Sess. 41 (1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 2950, 2985:

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C.

JUNE 21, 1961

Honorable Emanuel Celler
Chairman, Committee on the Judiciary
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H. R. 192, a bill "To amend sections 212, 310, 340, and 349 of the Immigration and Nationality Act."

The bill would amend by revision or addition certain provisions of the Immigration and Nationality Act. While the Department finds several of the amendments sought by the bill to be unobjectionable there are some provisions which it cannot support.

The provisions of the measure which the Department cannot support include subsection (c) of section 4 which would substitute for the "clear, unequivocal, and convincing" evidentiary standard presently required to establish denaturalization the standard that denaturalization may be established by "a preponderance of the evidence." The same is true of the similar provision of section 5 regarding expatriation cases. Section 5 also would set forth as an evidentiary rule that one who has performed an act of expatriation shall be presumed to have

done so voluntarily, permitting, however, the rebuttal of the presumption by a preponderance of the evidence. These provisions are presumably intended to overrule the decisions of the Supreme Court in *Schneiderman* v. *United States,* 320 U.S. 118 (1943) (denaturalization) and *Gonzales* v. *Landon,* 350 U.S. 920 (1955), and *Nishikawa* v. *Dulles,* 356 U.S. 129 (1958) (expatriation). The rationale of these cases is that because United States citizenship is such a precious right, no person should be deprived of it under the ordinary evidentiary rules prevailing in civil actions and that the Government must establish its case by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt." Viewed in the light of the severe consequences that attend the loss of American citizenship, often held over an extended period of time, the Department feels that it cannot lend its support to any proposal to diminish the high degree of protection accorded citizenship by the existing evidentiary standards. Moreover, it is questionable that such action would withstand constitutional attack particularly in its retroactive aspects. The Department doubts that this method of facilitating denaturalization and expatriation would result in ridding the country of subversives, criminals, or other undesirables. The present evidentiary rules are firmly entrenched; that regarding denaturalization survived the revisions made by the 1952 Act. In these circumstances, the Department does not feel that sufficient reasons exist for change.

Subject to the comments hereafter made with respect to section 1 relating to aliens afflicted with any dangerous contagious disease, we would have no objection to that section; or to section 2 relating to the admission of certain aliens afflicted with tuberculosis; or section 3 which would require that all naturalization proceedings be determined under the provisions of the Immigration and Nationality Act; or to subsections (a) and (b) of section 4 which would restore "illegality" as a ground for denaturalization.

With respect to section 1 of the bill existing law provides that among the classes of aliens who shall be ineligible to receive visas and who shall be excluded from admission to the United States are "Aliens who are afflicted with tuberculosis in any form, or with leprosy, or any dangerous contagious disease." The bill would amend this provision by omitting the specific references to tuberculosis and leprosy but would continue to provide for the exclusion of aliens who "are afflicted with any dangerous contagious disease." Some of the diseases which are included within the term "any dangerous contagious disease" are set forth in the regulations of the United States Public Health Service (42 C.F.R. 34.2(b)). While the diseases presently designated do not include active tuberculosis or leprosy it is assumed that with the elimination of these two specific diseases from the ambit of section 212(a) of the Act, the Public Health Service will include them among the diseases embraced within the cited regulation. In such event there would be no objection to this amendment.

Subject to revision of the bill to eliminate the objectionable features discussed above, the Department of Justice would have no objection to its enactment.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely yours,

Byron R. White
Deputy Attorney General

3. Report of the Department of Justice dated July 7, 1961 on H.R. 6300, 87th Cong., 1st Sess. (1961), *referenced in* H.R. Rep. No. 1086, 87th Cong., 1st Sess. 40 (1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 2950, 2984:

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D. C.

JULY 7, 1961

Honorable Emanuel Celler
Chairman, Committee on the Judiciary
House of Representatives
Washington, D. C.

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice concerning the bill (H. R. 6300) "To amend the Immigration and Nationality Act."

The bill, comprising 24 sections, would amend by revision or addition various provisions of the Immigration and Nationality Act. While the Department finds several of the amendments sought by the bill to be desirable and others unobjectionable, there are some which it cannot support.

The provisions of the bill the Department is unable to support include section 17(c), which would change the existing standard of proof required to establish denaturalization; and section 18, which would not only change the existing standard of proof in expatriation cases but would also provide as an evidentiary rule that one who has performed an act of expatriation shall be presumed to have done so voluntarily, permitting however the rebuttal of the presumption by a preponderance of the evidence.

The provisions of section 17(c) of the bill would substitute for the "clear, unequivocal, and convincing" evidentiary standard presently required to establish denaturalization the standard that denaturalization may be established by "a preponderance of the evidence." The same is true of the similar

provision of section 18 of the bill regarding expatriation cases. These provisions are presumably intended to overrule the decisions of the Supreme Court in *Schneiderman* v. *United States*, 320 U.S. 118 (1943) (denaturalization) and *Gonzales* v. *Landon*, 350 U.S. 920 (1955) and *Nishikawa* v. *Dulles*, 356 U.S. 129 (1958) (expatriation). The rationale of these cases is that because United States citizenship is such a precious right, no person should be deprived of it under the ordinary evidentiary rules prevailing in civil actions and that the Government must establish its case by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt." Viewed in the light of the severe consequences that attend the loss of American citizenship, often held over an extended period of time, the Department feels that it cannot lend its support to any proposal to diminish the high degree of protection accorded citizenship by the existing evidentiary standards. Moreover, it is questionable that such action would withstand constitutional attack particularly in its retroactive aspects. The Department doubts that this method of facilitating denaturalization and expatriation would result in ridding the country of subversives, criminals, or other undesirables. The present evidentiary rules are firmly entrenched; that regarding denaturalization survived the revisions made by the 1952 Act. In these circumstances, the Department does not feel that sufficient reasons exist for change.

Subject to the amendments hereafter indicated, which for the most part are of a technical nature, the Department of Justice would have no objection to sections 1 and 2, relating to the admission of orphans; section 6, relating to political changes in certain areas for quota purposes; section 7, relating to a Skilled Specialists Selection Board; section 8, establishing procedures for petitions on behalf of orphans and certain relatives; section 9, relating to aliens afflicted with any dangerous contagious disease; section 10, relating to petty offenses, section 11, relating to admissibility of certain otherwise inadmissible aliens who have relatives in the United States;

section 12, providing a three-year-period of validity for visas of certain adopted children of citizens; section 14, relative to deportability of certain aliens who procured documents of admission by fraud; section 15, to require that all naturalization petitions be determined under the provisions of the Immigration and Nationality Act; subsections (a) and (b) of section 17, which would restore "illegality" as a ground for denaturalization; section 19, extending exemption from expatriation to spouses and children of certain naturalized citizens; and sections 20-24, containing technical amendments and repeals required by the provisions of the bill.

With respect to section 1 of the bill, it is noted that it does not specify the time when the orphan must be under the age of 10 years, the maximum eligible age. This should be clarified, and it is suggested that the time be specified as the date on which the visa petition on his behalf is filed. The provision in section 2 that no natural parent shall gain any benefit under the act after an adoption has occurred is not sufficiently inclusive. The child may have been adopted by other parents prior to the adoption set forth in the bill. It is therefore suggested that "natural parent" should be changed to "prior parent."

The provisions of section 6 seem to be ambiguous with respect to the determination, in all circumstances—for instance geographic location, of the quota which might result for areas which undergo political changes.

With respect to section 7, it should be noted that one of the statutory factors to be considered in first preference cases is whether there is urgent need for the services of the alien in the United States. Accordingly, first preference petitions must be acted upon as speedily as possible. During the calendar year ending December 31, 1960, 13,205 first preference petitions were filed with the Immigration and Naturalization Service. The creation of a Skilled Specialists Selection Board, as contemplated by section 7, to review and make recommendations in such a large number of cases would result in delays and backlogs in the processing of these petitions. It has also been

found necessary in many of these cases to conduct investigations abroad in order to establish the authenticity of supporting documents and by interview with the alien involved, to determine whether he, in fact possesses the specialized skills claimed. If a Selection Board were to be established, it would be required to employ sufficient personnel to conduct these necessary investigations and interviews. The Department believes that such a body within the Immigration and Naturalization Service, whose function would be the performance of functions presently discharged by employees of the Service, is unnecessary and would unduly complicate existing adequate procedures. However, if such a Board is to be established it should be made clear that it would function in an advisory capacity only. It is also suggested that consideration be given to including in the agencies to be represented on the Board the Department of State and the Department of Labor.

Among other things, section 8 would prohibit approval of a petition for quota immigrant or preference status in behalf of an alien relative if the alien had previously been accorded either a nonquota status as the spouse of a United States citizen or a third preference quota status as the spouse of a lawfully resident alien by reason of a marriage entered into for the purpose of evading the immigration laws. In order that this prohibition may apply to immigrant visa petitions for all aliens rather than only those for relatives, it is suggested that section 204 of the Immigration and Nationality Act be similarly amended.

With respect to section 9, some of the diseases which are included within the present term, "any dangerous, contagious disease" are set forth in the regulations of the United States Public Health Service. (42 CFR 34.2(b)) The diseases designated do not include active tuberculosis or leprosy. It is assumed that, with the elimination of these two specific diseases from the ambit of section 212(a)(6) of the Act, the Public Health Service will include them among the diseases embraced by the cited regulation.

The proviso to section 10 appears to be limited to an alien who has *committed* only one offense. It is suggested that the proviso be revised to read "provided, that the alien has committed only one such offense, or admits the commission of acts which constitute the essential elements of only one such offense."

The provisions of the bill which the Department considers most helpful are section 3, extending benefits to veterans of the Korean hostilities; section 4, providing for the judicial review of orders of deportation; section 5, creating a quota reserve consisting of the total amount of quota numbers that are not issued during any fiscal year; section 13, which would delete the requirement that applicants for visas and alien registration state their race and ethnic classification; and section 16 which would include within the classes of veterans eligible for expeditious naturalization on the basis of military service those who rendered service during the Korean hostilities.

The provisions of section 4 relating to the judicial review of orders of deportation are the same as those of the bill, H. R. 187, on which this Department submitted a favorable report to the Committee April 18, 1961.

The Department regards the objectives of section 5, establishing a quota reserve and making available unused quota numbers (approximately 50,000 annually), as an important progressive and necessary step in the liberalization of the quota provisions of the immigration laws. We believe, however, that it would be preferable to provide a less cumbersome method of allocating the quota reserve and also to make it available to aliens in the first preference category as well as those in the second, third and fourth preferences. The following language is suggested as a substitution for section 5 of the bill:

> "Section 201 of the Immigration and Nationality Act (8 U.S.C. 1151) is amended by adding the following:
>
> '(f) Quota numbers not issued or otherwise used during any fiscal year shall thereafter be made available during

> the first half of the next succeeding fiscal year to quota immigrants, if otherwise admissible under the provisions of the Immigration and Nationality Act, who are entitled to the preference classifications authorized by section 203(a)(1), (2), (3) and (4) and are unable to obtain prompt issuance of visas due to oversubscription of their quotas as determined by the Secretary of State. These unused quota numbers shall be allocated within the percentage limitations and in the order of priority specified in sections 203(a), (b), and (c) without regard to the quota nationality to which the alien is chargeable. The limitation on the number of visas which may be issued in any single month shall not be applicable to visas issued under this subsection.' "

Under the formula provided by the Immigration and Nationality Act, the combined annual quota for all quota areas totals approximately 155,000. However, many thousands of quota numbers are not issued during each quota year; under existing law, these unused numbers are irrevocably lost. The loss is primarily with respect to the larger quota areas such as Great Britain, Eire, and Germany, where the demand for visas is usually well under the maximum allowable quota. On the other hand, in many countries with relatively modest quotas the demand for visas far exceeds the annual available supply. As a result consular waiting lists in these countries are heavily oversubscribed even for aliens who are entitled to preference quota status.

The Department's proposal would alleviate this situation by permitting the allocation of quota numbers which are unused at the end of each fiscal year among the preference quota classes established by the Immigration and Nationality Act. Thus, these special quota visas would be made available only to immigrants who qualify as skilled specialists or as close relatives either of United States citizens or of resident aliens. The numerical distribution of such visas would be made on the basis of the percentage formula now utilized in section 203(a) of the Immigration and Nationality Act; 50% to first preference,

30% to second preference, and 20% to third preference, with any remainder not taken by the first three preferences available to fourth preference immigrants. Within these percentages, the order of priority for visas would follow the "first come, first served" principle established in the present structure of the law.

To allow qualified quota immigrants within the preference classes to compete on an equal footing, the Department's proposal also provides that unused quota numbers shall be allocated without regard to the quota nationality of the alien. This would assist many deserving aliens who, while registered for many years on a consular waiting list, have been unable to obtain visas because of the heavy oversubscription of the quotas to which they are chargeable. The issuance of unused quota numbers would be permitted only in those cases where the alien cannot obtain the prompt issuance of a visa because of the oversubscription of the quota to which he must be charged. It would further be required that these special quota visas should be issued during the first six months of the following fiscal year. If this is done, the limitation in section 201(c) of the Immigration and Nationality Act on the number of visas which may be issued in a single month would be declared inapplicable with respect to special quota visas.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely yours,

Byron R. White
Deputy Attorney General

(N.B. Item 1 was obtained from the Immigration and Naturalization Service, and items 2 and 3 from the Criminal Division of the Department of Justice).